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No. ____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Respondent was a "limited-purpose public figure" for the purposes of the zoning controversy involving Petitioner's property.

II. Whether Petitioner's published opinion was constitutionally privileged under the First Amendment.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Authorities iv

Opinions Below 1

Statement of Jurisdictional Grounds 2

Constitutional and Statutory Provisions Involved 4

Statement of the Case 5

Reasons For Granting The Writ 12

Argument 13

I. MOORE WAS A PUBLIC FIGURE FOR THE PURPOSES OF THE EVERGREEN ZONING CONTROVERSY 13

A. The Evergreen Zoning Struggle Was A Public Controversy 15

B. Moore Was A Limited-Purpose Public Figure For The Purposes Of The Public Controversy Surrounding Evergreen 16

II. FLEMING'S PUBLISHED OPINION SHOULD ENJOY ABSOLUTE CONSTITUTIONAL IMMUNITY AGAINST DEFAMATION LIABILITY 19

A. Fleming Lacked The High Degree Of Subjective Awareness Of The Probable Falsity Of His Opinion Required By New York Times 21

B. Fleming's Published Opinion Contained No False Statement Of Fact 23

C. Moore Exposed Himself to Comment When He Mounted The Rostrum To Speak 25

Conclusion 28

Appendices A-1

..... B-1

..... C-1

..... D-1

..... E-1

..... F-1

..... G-1

..... H-1

..... I-1

..... J-1

..... K-1

TABLE OF AUTHORITIES

CASES: Page

UNITED STATES SUPREME COURT:

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 3

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 14

Garrison v. Louisiana, 379 U.S. 64 (1964) 21

Gertz v. Robert Welch, Inc., 418 U.S. 232 (1974) 13, 19, 26

Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) 15

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 14, 18, 21, 26

Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974) 21

St. Amant v. Thompson, 390 U.S. 727 (1968) 21

Time, Inc. v. Pape, 401 U.S. 279 (1971) 22

Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) 17

LOWER COURTS:

Arctic Co. v. Loudoun Times Mirror, 624 F.2d 518 (4th Cir.), cert. denied, 449 U.S. 898 (1980) 16

Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980) 24

Ferguson v. Watkins, 448 So. 2d 271 (Miss. 1984) 19, 24, 25

Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981) 2, 25

Gregory V. McDonnell Douglas Corp., 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976) 19

Harris v. Tomczak, 94 F.R.D. 687 (E.D. Cal. 1983) ... 14, 17

Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), cert. denied sub nom. Hotchner v. Doubleday & Co., 434 U.S. 834 (1977) 22, 24

National Ass'n of Gov't Employees v. Central Broadcasting Corp., 379 Mass. 220, 396 N.E.2d 996 (1979), cert. denied, 446 U.S. 935 (1980) 20, 25

Ollman v. Evans, 713 F.2d 838 (D.C. Cir. 1983) (per curiam) 20, 22, 23, 24

Rinaldi v. Rinehart, Holt & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, cert. denied, 434 U.S. 969 (1977) 19

Rosanova v. Playboy Enterprises, 580 F.2d 859 (5th Cir. 1978) 16

Waldbaum v. Fairchild Publications, 627 F.2d 1287 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980) 15

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const. amend. I 4

28 U.S.C. § 1257(3)(1982) 4

Sup. Ct. R. 21.1(b) 5

SECONDARY SOURCES:

Christie, Defamatory Opinions And The Restatement (Second) of Torts, 75 Mich. L Rev. 1621 (1977)..... 20

Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033 (1936)..... 27

Note, Defining A Public Figure In The Constitutional Law of Defamation, 69 Va. L. Rev. 931 (1983)..... 14

Note, Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of A Privilege, 34 Rutgers L. Rev. 81 (1981)..... 23

Restatement (Second) of Torts § 566 & Comment (c) (1977)..... 19, 20

Smolla, Let the Author Beware: The Rejuvenation of The American Law of Libel, 132 U. Pa. L. Rev. 1 (1983)..... 14

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v.

W. BEDFORD MOORE, III,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The petitioner, James N. Fleming (Fleming), respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia rendered on June 7, 1984, declining to address the federal constitutional issues that this Petition for Certiorari presents.

OPINIONS BELOW

A copy of the Final Judgment Order entered in the first trial of this case by the Circuit Court of Albemarle

County, Virginia may be found at App. A.[1] The decision of the Circuit Court was reversed by the Supreme Court of Virginia which rendered its decision in Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981) (App. B). The case was remanded to the Circuit Court of Albemarle County, Virginia, for a new trial. Upon remand the Circuit Court affirmed a jury verdict in favor of Moore (App. I.). The Supreme Court of Virginia declined to exercise its jurisdiction to review the federal constitutional issues presented in Fleming's Petition for Appeal from the second trial decision, although it did grant Fleming an appeal on four state law issues (App. J).

STATEMENT OF JURISDICTIONAL GROUNDS

Fleming properly presented his constitutional claims under the First Amendment both to the Circuit Court of Albemarle County and to the Supreme Court of Virginia. The Supreme Court of Virginia refused to review the Circuit

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1 All references to the trial transcript are as follows: "(Tr. __)." References to Moore's exhibits are indicated as "(PX __)" and Fleming's exhibits as "(DX __)." All references to the Appendices are indicated as "(App. __)."

Court's rulings on those First Amendment issues. The refusal of the Supreme Court of Virginia to review those First Amendment rulings renders the Circuit Court's rulings "final" under the rule enunciated by this Court in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477, 479 (1975). This Court's certiorari jurisdiction is invoked under 28 U.S.C. § 1257(3)(1982).

Fleming seeks review of (1) the Circuit Court's denial of Fleming's motion to dismiss the libel case against him on the ground that his published opinions constituted protected speech under the First Amendment (App. C); (2) the Circuit Court's ruling on October 22, 1982, holding that Moore was a private rather than public figure (App. E); and the Final Judgment Order entered and dated June 3, 1982 (App. I). This Petition for Certiorari was filed within 90 days of the Supreme Court of Virginia's July 7, 1984 Order refusing to review the First Amendment issues on which Fleming sought an appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution and statutes relevant to the disposition of this case are:

> 1. Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

U.S. Const. amend. I.

> 2. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows
>
> * * *
>
> (3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . .

28 U.S.C. § 1257(3)(1982).

STATEMENT OF THE CASE

This libel case emerged from the wake of a heated zoning controversy involving Fleming's plans to develop a 128-acre housing project known as Evergreen close to the Rivanna Reservoir in Albemarle County, Virginia. This proposed development abutted respondent W. Bedford Moore, III's (Moore's) 102-acre estate.[2]

Fleming, the petitioner, is a 55-year old black resident of Charlottesville, Virginia, where, apart from ten years spent at school and in the military, Fleming has made his lifelong home. He designed the Evergreen development to provide housing for low and middle income families (Tr. 176).

Moore, the respondent, is a tenured assistant professor in the Humanities Division of the School of Engineering at the University of Virginia. His residential estate, known as "Shack Mountain," was adjacent to the proposed Evergreen development.

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2 Fleming and Moore are the only parties to this proceeding. Sup. Ct. R. 21.1(b).

Although Evergreen would have been only one of the residential developments in the Rivanna Reservoir area, it provoked a firestorm of local controversy in which Moore assumed a highly visible and prominent role. In November 1974, Moore began to use the County's public forums to oppose the project, speaking publicly at two County Planning Commission Meetings and a County Board of Supervisors' meeting (Tr. 72, 300). Moore allegedly felt concerns not only for his own property, but also for what he perceived as a threat posed by excessive residential development to the drinking water supply in the reservoir (Tr. 69, 79-80). Indeed, he testified that it was his "duty to speak up on the reservoir, it was important, thirty thousand people drank from it" (Tr. 77).

Moore's concern for and his commitment to act on behalf of the community's welfare was reiterated in a letter that Moore wrote to Fleming in 1974 terminating negotiations that he had initiated with Fleming for the purchase of land adjacent to Shack Mountain (Tr. 65-66, 103-04; PX 4). In this letter Moore informed Fleming that he could no longer negotiate in good faith for a private purchase of land because he believed that it was his duty to "oppose your [Fleming's]

project in the public hearings — as I feel I must do for the good of my neighbors and the county as a whole."

Ultimately, Moore's efforts to obstruct county approval of Fleming's development were successful. The County Board of Supervisors denied Fleming a special use permit for his project on February 22, 1975, notwithstanding the Planning Commission's recommendation for approval of the project, with certain modifications.

Fleming renewed his attempts to secure approval of Evergreen in November 1975. Once again, Moore assumed a prominent role in the public opposition to Fleming's project, attending at least four public meetings concerning the project (Tr. 83). Moore's attorney, James Murray, characterized Moore as one of the leading public antagonists to Evergreen (Tr. 289), and also spoke in his behalf to the Board of Supervisors at a December 1975 public hearing (DX 1).

Again the Planning Commission recommended approval of Fleming's project, this time conditioned upon the dedication by Fleming of a 100-foot tree buffer abutting Moore's property (Tr. 81). Once more, on January 28, 1978, the Board of Supervisors denied approval of the project.

Moore took a vigorously antagonistic stance to the renewed Evergreen plans on behalf of the community as a whole. In describing his own role, Moore stated with disarming candor at trial, "[I]f private citizens don't take positions on matters of public interest where would we be . . . ?" (Tr. 148).[3]

Shortly before Fleming's development plans were denied for the second time, he placed a paid advertisement in the Cavalier Daily, the official newspaper of the University of Virginia. The publication became the subject of the ensuing lawsuit (App. K).[4] Exasperated and frustrated that his efforts to develop low and middle income housing were encountering stiff public opposition, when other developments were seemingly receiving little or no opposition, Fleming placed the

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3 Confronted with seemingly insurmountable opposition, Fleming finally abandoned his development plans and in 1980 dedicated the land upon which he had hoped to build Evergreen to the Nature Conservancy. The land is now a public park owned by the City of Charlottesville, and open to persons of all races, creeds and colors pursuant to a provision included at Fleming's insistence in the deed of dedication.

4 The paid political commentary appeared on three separate occasions. It was first published in the Charlottesville-Albemarle Tribune, a local black weekly newspaper, on January 8, 1976. It was subsequently published in the Cavalier Daily on January 15 and 16, 1976.

advertisement, entitled "Racism," to voice his opinion regarding the motivation of his opposition. The article elaborated Fleming's social and economic philosophy, and contained his opinion that the entire zoning controversy over his proposed development was a struggle between the "haves" and the "have-nots." Fleming analogized Moore's own estate with Jefferson's Monticello and contrasted what he perceived as Moore's beliefs with Jefferson's ideals. Part of the opinion contained Fleming's rhetorical statement that Moore "does not want any black people within his sight."

Moore sued Fleming for libel in the Circuit Court of Albemarle County, and in 1978 obtained a jury verdict, which was reversed by the Supreme Court of Virginia and remanded for a new trial because of defective jury instructions (App. A, B). Very little evidence of Moore's role in the public controversy was adduced at the first trial (Tr. 538).

Shortly before the second trial, Fleming moved to dismiss the action on the ground that his published opinion constituted protected political speech under the First Amendment to the United States Constitution. He also argued that the term "racism" was a subjective statement of opinion

incapable of being proved either true or false. The motion was denied at a hearing held on October 7, 1982 (App. C).

At the second trial, held on October 21-22, 1982, Moore chose to characterize the offending statement as one of fact, and showed that he already had black neighbors living within his sight (Tr. 70). Moore stated that he believed Fleming had published the advertisement in an effort to intimidate him, and to silence his vigorous opposition to Evergreen (Tr. 111-12).

Moore called Fleming as an adverse witness at trial, and asked Fleming whether he really believed that Evergreen's opponents were, in fact, racially motivated. Fleming candidly responded, "I feel that a way then and I feel that a way today" (Tr. 194), a belief he restated during his testimony on at least six separate occasions (Tr. 182, 183, 197, 218, 234, 504). He asserted his conviction that the real ground for the opposition to Evergreen was "racism and not pollution" (Tr. 234) and that he felt his antagonists were "conspiring against me because I was black" (Tr. 194). He also explained that his opinion regarding the motivation of his opposition was well-grounded because a number of other developments

sponsored by white developers in the reservoir area had encountered virtually no opposition (Tr. 194-97). Furthermore, Fleming stated, "I have never had a person to come to me and tell me he's racist to my face" (Tr. 201).

At the close of Moore's case, Fleming moved to strike the evidence on the grounds that there had been no proof of actual malice; that the word "racism" was not defamatory; and that, in the context of this public controversy, Fleming's publication constituted a constitutionally privileged statement of opinion. The motion was denied (App. D). Fleming renewed his Motion at the close of all the evidence on essentially the same grounds, and it was again denied by the trial court (App. D.).

During the argument on the jury instructions the trial court concluded as a matter of law that Moore was not a limited-purpose public figure (App. E), and granted Moore's instructions 9 and 10, which allowed the liability case to go to the jury on a theory of simple negligence rather than actual malice (App. F). Fleming contemporaneously objected to the ruling and to the instructions (Tr. 537-39).

The jury returned a verdict of $100,000 in compensatory damages, $250,000 in punitive damages, and 12% prejudgment interst running from the date of publication on $250,000 of the award (App. G).[5] Fleming moved to set the verdict aside. He also moved for a remittitur. The Court denied both motions in a letter opinion dated April 21, 1983 (App. H).

Final judgment was awarded to Moore and entered on June 3, 1984 (App. I). Fleming noted his appeal to the Supreme Court of Virginia on June 30, 1984. The Supreme Court of Virginia declined by an Order dated July 7, 1984, to review the federal constitutional issues presented by Fleming's appeal (App. J).[6]

REASONS FOR GRANTING THE WRIT

This case presents two important questions of constitutional law left unsettled by this Court and receiving

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5 The jury verdict now totals more than $600,000.00.

6 The Supreme Court of Virginia did agree to grant Fleming an appeal on four assignments of error involving state law. That appeal is pending.

pronouncedly inconsistent treatment in the lower courts. The first question concerns defining a "limited-purpose public figure" in the context of a local public controversy. The second concerns the degree of constitutional protection to be accorded statements of opinion, capable of no forensic demonstration of truth or falsity, uttered during the heat of intense public debate, involving controversial issues affecting an entire community.

ARGUMENT

I. MOORE WAS A PUBLIC FIGURE FOR THE PURPOSES OF THE EVERGREEN ZONING CONTROVERSY

A "public figure" has been defined by this Court as one who has obtained such pervasive fame and notoriety as to be a public figure for all purposes, or alternatively, and more commonly, one who has "thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (emphasis added). The "limited-purpose public figure" mentioned in Gertz must meet two requirements. First, he must be involved in a "public

controversy," and second, he must inject himself voluntarily and purposefully into the nucleus of this controversy.

This Court has held that for "public figures" to recover damages in a defamation action they must show that the defendant uttered a defamatory falsehood with the "actual malice" required by New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). See, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

The lower court cases which have struggled to apply Gertz's diaphanous definition are "[t]o be frank . . . in profound disarray." Harris v. Tomczak, 94 F.R.D. 687, 692 (E.D.Cal. 1982).[7] In this case, the trial court clearly failed to understand either aspect of the constitutional test for determining a public figure when it held that Moore was not a public figure for the purposes of the Evergreen imbroglio.

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7 See also Smolla, Let The Author Beware: The Rejuvenation of The American Law of Libel, 132 U. Pa. L. Rev. 1, 30 n.47, 34 n.162 (1983) (noting that Gertz is being inconsistently applied by lower courts); Note, Defining A Public Figure In The Constitutional Law of Defamation, 69 Va. L. Rev. 931, 944 & n. 78 (1983) (noting that courts are having extreme difficulty in defining what constitutes a public controversy).

Therefore, this case presents an opportunity to correct the specific errors committed by the trial court and to give guidance to the lower courts in making public figure determinations.

A. The Evergreen Zoning Struggle Was A Public Controversy

In Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), this Court held that a vigorous local zoning controversy involving matters critical to local self-government amounted to a public controversy. Id. at 7-11. This holding is consistent with the most comprehensive definition offered by a lower court for determining when a public controversy exists: "If the issue was being debated publicly and it had foreseeable and substantial ramifications for non-participants, it was a public controversy." Waldbaum v. Fairchild Publications, 627 F.2d 1287, 1297 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980).

Moore involved himself vigorously in the public debate regarding housing development. This issue had substantial ramifications for present and future residents of the

Rivanna Reservoir area. As such, the debate concerned issues having a substantial effect upon persons other than the immediate protagonists at the numerous public meetings, and should therefore be classified as a matter of legitimate public controversy in accordance with the Bresler-Waldbaum line of reasoning. Moore's own evidence established the development controversy as a matter of "public interest" (Tr. 147-48) affecting the "county as a whole" (Tr. 66-67; PX 4). See also Arctic Co. v. Loudoun Times Mirror, 624 F.2d 518, 519 (4th Cir. 1980), cert. denied, 449 U.S. 1102 (1981)(local zoning dispute a "public controversy").

B. Moore Was A "Limited-Purpose Public Figure" For The Purposes Of The Public Controversy Surrounding Evergreen

The majority of courts attempting to apply the definition of "public figure" offered in Gertz has often resorted to a nebulous "I know it when I see it" test. See, e.g., Rosanova v. Playboy Enterprises, 580 F.2d 859, 861 (5th Cir. 1978). This is because "the public figure concept has eluded a truly working definition." Id.

In his concurrence in Wolston v. Reader's Digest Ass'n, 433 U.S. 157 (1979), Justice Blackmun, while agreeing that Wolston was not a public figure, commented that the Court seemed to hold "that a person becomes a limited-issue public figure only if he literally or figuratively 'mounts a rostrum' to advocate a particular view." 443 U.S. 157, 169 (Blackmun, J., concurring) (emphasis added). Although Justice Blackmun criticized this development, later decisions have relied on his language and attempted to limit the definition of "limited-purpose" or "vortex" public figures to those persons who have actually mounted the rostrum to give vent to their concerns for the common weal. See, e.g., Harris v. Tomczak, 94 F.R.D. at 704.

In this case Moore mounted the rostrum, both literally and figuratively, to give strident voice to his opposition to the Evergreen development. He did so not only to protect the value of his own property, but also to give vent to his concern about pollution in the reservoir (Tr. 64, 77, 79-80). He openly admitted at trial that his public involvement was purely voluntary, and actuated by his own desire to promote what he perceived to be the best interests of his neighbors

and the county as a whole (Tr. 66-67; PX 4). Moore injected himself not merely into the periphery, but to the forefront of this particular local zoning controversy. Moore's own witnesses saw him as one of the most prominent leaders in the opposition to Evergreen (Tr. 289, 442).

The Circuit Court of Albemarle County, therefore, erred in ruling that Moore was a private individual rather than a public figure for the purposes of the Evergreen controversy. This error fatally tainted the court's instructions 9 and 10 which did not require Moore to prove New York Times actual malice clearly and convincingly in order to recover. By allowing Moore to recover on a theory of simple negligence, the Circuit Court unconstitutionally constricted the "breathing space" that Fleming's First Amendment freedom to comment uninhibitedly upon a public figure's role in a heated local controversy affirmatively requires. See New York Times Co., 376 U.S. at 270-72. If allowed to stand, the Circuit Court's judgment would sanction and encourage "self-censorship" of political speech, and restrict dramatically the scope of public debate that this Court has repeatedly maintained must be uninhibited, robust, and wide-open.

II. FLEMING'S PUBLISHED OPINION SHOULD ENJOY ABSOLUTE CONSTITUTIONAL IMMUNITY AGAINST DEFAMATION LIABILITY

This case involves the largest libel judgment in Virginia's history. Fleming urges this Court to recognize that the logic of Gertz's statement that there is no such thing as a false idea, 418 U.S. at 339-40, compels the conclusion that the opinion complained of occupied a position of absolute constitutional privilege in the context of political debate on an important public issue.

Unless an opinion is factually false, or implies the existence of undisclosed defamatory facts, it must occupy a position of absolute constitutional privilege. This is the position taken by the American Law Institute, Restatement (Second) of Torts § 566 comment (c)(1977), and by the highest courts of California, Mississippi, New York and Massachusetts. Gregory v. McDonnell Douglas Corp., 17 Cal.3d 596, 600, 552 P.2d 425, 427, 131 Cal. Rptr. 641, 643 (1976); Ferguson v. Watkins, 448 So. 2d 271, 276 (Miss. 1984); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 380-81, 366 N.E.2d

1299, 1306, 397 N.Y.S.2d 943, 950, cert. denied, 434 U.S. 969 (1980); National Ass'n of Gov't Employees v. Central Broadcasting Corp., 379 Mass. 220, 227-28, 396 N.E.2d 996, 1001 (1979), cert. denied, 446 U.S. 935 (1980). This Court, however, has been silent on the implementation of the principle that the First Amendment confers an absolute privilege upon expression of opinion. See Ollman v. Evans, 713 F.2d 838, 841, 844 (D.C. Cir. 1983).

Fleming urges this Court to articulate a constitutional standard based on the Restatement (Second) of Torts § 566. This section provides that "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."[8] The recent cases confirm that this rule and the distinction between defamatory and non-defamatory opinion are of constitutional dimensions. National Ass'n of Gov't Employees, 379 Mass. at 228, 396 N.E.2d at 1001.

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8 The evolution of this language following Gertz and its progeny has been comprehensively traced in Christie, Defamatory Opinion and the Restatement (Second) of Torts, 75 Mich. L. Rev. 1621 (1977).

A. Fleming Lacked The High Degree Of Subjective Awareness Of The Probable Falsity Of His Opinion Required By New York Times

New York Times provides that a public figure may recover for an allegedly defamatory statement only when the evidence clearly and convincingly establishes that the statement was made with actual malice. That is, a public figure plaintiff must prove that the allegedly defamatory statement was made with knowledge that the statement is false, or with a reckless disregard for whether or not the statement is true. 376 U.S. at 279-80. Before the test of reckless disregard can be satisfied, there must be a false statement of fact. Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974). This Court has also stated that New York Times "actual malice" requires either that the defendant has a high degree of subjective awareness that the statement made is probably false, or has obvious reason to doubt the veracity of his information or informant. Garrison v. Louisiana, 379 U.S. 64, 74 (1964); St. Amant v. Thompson, 390 U.S. 727, 731-32 (1968).

An assertion that cannot be proved false cannot be libelous. Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), cert. denied sub nom. Hotchner v. Doubleday & Co., 434 U.S. 834 (1977). This notion is a synthesis of the Gertz and Austin line of cases. Although simply stated, application of this concept poses certain difficulties. Pure opinion, certainly, can never be proved either true or false in any objective sense. Ollman, 713 F.2d at 845. See also Time, Inc. v. Pape, 401 U.S. 279, 285 (1971) (Court well aware of problems of determining what "truth" may be in libel cases).

When he examined the circumstances in which he found himself, Fleming came to the conclusion that the opposition to his housing development, including Moore, was racially motivated. Fleming himself testified that he had never had anyone openly admit themselves to be a racist to his face (Tr. 201). Therefore, he had to base his opinion regarding the motivation of his opposition on the circumstances in which he found himself.[9]

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9 Moore testified at trial that he already had black neighbors within sight from his estate. In so doing he at-

(Footnote cont.)

Fleming's perceptions represent precisely the kind of "pure opinion" described by the Ollman court, 713 F.2d at 845, and amount to the kind of "'loosely definable, variously interpretable,' generally derogatory remarks that frequently are flung about in colloquial argument and debate." Id.[10] Ollman held that such statements of opinion fall within the ambit of an absolute constitutional privilege. Id. at 846.

B. Fleming's Published Opinion Contained No False Statement Of Fact

For the purposes of constitutional privilege, there is a major difference between a false conclusion and a false

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(Footnote cont.)

tempted to demonstrate the falsity of the statement that "Moore . . . does not want any black people in his sight." In so arguing, Moore erroneously attempted to treat literally the figurative language Fleming had used rhetorically in the context of the entire opinion. Even taking Moore's argument on its face, the fact that Moore had black people already within his sight does not vitiate Fleming's belief that Moore did not want them within his sight.

10 See also Note, Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege, 34 Rutgers L. Rev. 81, 83 (1981)(terms like "fascist," "anti-semite," and "racist" are "evaluative opinions," and are matters of inference and judgment not susceptible to explicit proof or disproof).

statement of fact. Ollman, 713 F.2d at 847 n.74. Fleming's opinion, containing his conclusion regarding the motivation of the opposition to his housing development, was firmly held both when he published the statement and at trial (Tr. 504). He entertained no serious doubts whatsoever that this opinion might be factually incorrect. The published opinion conveys Fleming's desire to provide housing for hard-working people together with his own political beliefs; the assertion that his antagonists' concerns with pollution were a "sham;" and his conviction that the opposition to his project really stemmed from racial and economically-exclusionary motives (App. K). Nowhere in his opinion is there the false statement of fact, or the implication that undisclosed supporting facts exist, demanded as a constitutional prequisite to liability by New York Times and Austin.[11]

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11 In similar circumstances, other courts have sided with the Restatement's practical and logical solution to discerning between fact and opinion. For example, where an opinion is more than just a derogatory remark and charges the commission of serious crimes, the First Amendment confers no absolute immunity. Cianci v. New Times Publishing Co., 639 F.2d 54, 63 (2d Cir. 1980). Similarly, negative characterizations of a person's character, which are coupled with the clear implication that the author is privy to undisclosed facts unknown to the audience, enjoy no constitutional privilege. Hotchner, 551 F.2d at 913; Ferguson, 448 So. 2d at 276.

Fleming urges this Court to hold that opinion statements should be actionble only where they clearly and unmistakably imply the allegation of undisclosed and defamatory facts as the basis for the opinion. See Ferguson, 448 So. 2d at 276. One court has recently stated such a holding rather succinctly,

> [i]f there should be any doubt about the sweep of the reasoning as applied to what may be termed private libels, there can, we think, be none in cases like the present where we have a public communication directed to a "public figure" . . . on a matter of public concern.

National Ass'n of Gov't Employees, 379 Mass. at 228, 396 N.E.2d at 1001. In such cases, statements of pure opinion deserve absolute constitutional protection.

C. Moore Exposed Himself To Comment When He Mounted The Rostrum To Speak

In Fleming v. Moore, 221 Va. 884, 894-95, 275 S.E.2d 632, 639 (1981)(Harrison, J., dissenting), Justice Harrison believed the case against Fleming should have been reversed and dismissed, not merely reversed and remanded. He observed that the words "racism" and "racist" are bandied about our society today with

complete abandon. He characterized Fleming's opinion as "a poorly conceived and intemperate diatribe by an irate, disappointed, and frustrated real estate developer who believes that his white opponent in a rezoning matter is not as concerned with pollution as he is apprehensive over the prospect of a "predominantly black, lower-middle income" development adjoining the property. Id. at 895, 275 S.E.2d at 639. Justice Harrison also suggested that the verbal assault should have been anticipated by Moore when he left the academic community and entered the controversial arena of zoning and real estate development. Id.

Justice Harrison's comments, and his Jeffersonian regard for the freedom of public debate that the First Amendment protects, were clearly correct. This Court has on numerous occasions iterated that in the realm of political belief and public debate sharp differences frequently arise. See New York Times, 376 U.S. at 271. However pernicious an opinion may seem, the Constitution depends for its correction upon the competition of other ideas and not upon the conscience of judges and juries. Gertz, 418 U.S. at 339-40. The right to speak one's mind on all public issues, although not always with perfect good taste, has always been a prized American privilege. That privilege recognizes that

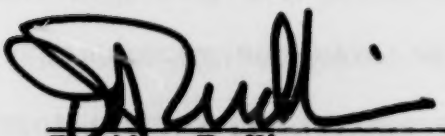
during the course of political debate heated exchanges may well include vehement, caustic, and sharp attacks upon others.

Moore himself should have anticipated that he would become the focus of legitimate public comment when he voluntarily thrust himself to the forefront of the Evergreen issue. In such a situation, the more appropriate remedy, and one which must apply in this case, was one recommended by Professor Magruder over forty years ago: "[A] certain toughening of the mental hide." Magruder, Mental and Emotional Disturbance In The Law Of Torts, 49 Harv. L. Rev. 1033, 1035 (1936). This Court should not countenance allowing this libel award in favor of Moore to stand, and should rule that Fleming's published opinion enjoyed an absolute constitutional privilege.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,



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APPENDIX A

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. _____

April 28, 1978

FINAL JUDGMENT ORDER

Plaintiff and Defendant, by counsel, came to be heard upon the following pleas and motions on the following dates: on November 30, 1977, on Defendant's Motion for Summary Judgment; on December 2, 1977, on Plaintiff's Motion for Leave to Amend his Motion for Judgment previously filed herein, and Defendant's Motions for a Continuance and for leave to file additional pleadings; on December 6, 1977, on Defendant's Plea of the Statute of Limitations, Demurrer to Plaintiff's Amended Motion for Judgment, Amended Grounds of Defense and Plea of Justification, Motion for Continuance, Motion for Judgment by Default, and Motion for Summary Judgment to Plaintiff's Amended Motion for Judgment; and were argued by counsel.

Upon consideration whereof, the Court ADJUDGED and ORDERED:

(1) On December 2, 1977, Defendant was granted leave to file additional pleadings and Defendant's Motion for Summary Judgment and Motion for a Continuance were overruled. On the same date, Plaintiff was granted leave to

amend his Motion for Judgment by adding the numbered paragraph (6) which had been filed with the Clerk, but only through and including the second line of the second page of said amendment ending with the sentence which concludes with the words "race or ethnic origin." Plaintiff's Motion for Leave to Amend his Motion for Judgment was denied as to the remainder of said numbered paragraph (6) which follows the sentence ending with the words "race or ethnic orgin," to which ruling the Plaintiff objected and duly noted his objections.

(2) On December 6, 1977, Defendant's Plea of the Statute of Limitations, Demurrer to Plaintiff's Amended Motion for Judgment, Motion for Continuance, Motion for Judgment by Default, and Motion for Summary Judgment to Plaintiff's Amended Motion for Judgment were denied and overruled. On the same date, Defendant's Plea of Justification was struck in part and Defendant's Amended Grounds of Defense to Plaintiff's Amended Motion for Judgment were allowed through paragraph (4) thereof, and paragraphs (5) through (8) thereof were stricken.

On December 6, 1977, again the parties, by counsel, came and also a civil panel pursuant to the venire facias heretofore issued. The venire was duly sworn and examined by the Court. During the voir dire, Defendant moved for a mistrial, which motion was considered by the Court and overruled. Three members of the venire were excused for cause by the Court and replaced by three additional members who were duly sworn and examined. The venire was then found to be free of exception, whereupon, counsel for the Plaintiff and counsel for the Defendant jointly, alternately, struck three members from the panel, leaving seven veniremen who were thereupon duly sworn to well and truly try the issues joined between the parties and a true verdict to render according to the law and evidence.

After the opening statements of counsel and the presentation of Plaintiff's evidence, counsel for Defendant moved to strike the Plaintiff's evidence, which motion was argued by counsel, duly considered by the Court and overruled. To which ruling the Defendant objected and noted his exceptions. The Defendant then introduced his evidence and rested. Whereupon counsel for the Plaintiff moved to

strike Defendant's evidence regarding his counterclaim. Defendant immediately took a nonsuit on his counterclaim before the Court ruled on Plaintiff's motion to strike.

One of the grounds advanced by the Defendant for his motion to strike was that the publication was not libelous per se and that plaintiff's evidence disclosed no proof of specific damages, which ground the Court duly noted, overruled and found that such publication was libelous per se, to which ruling the Defendant duly objected and excepted. Likewise, in support of his objection to the instructions, defendant advanced the same ground, upon which the same rulings were made by the Court and the defendant duly noted his objections and exceptions.

Whereupon, the Court received proposed instructions from counsel for Plaintiff and counsel for Defendant, granted some, amended some, and refused some. Counsel were then given the opportunity to note their exceptions and objections with regard to the instructions. Thereupon, the Court instructed the jury and counsel made their closing arguments.

The jury retired from the courtroom to consider its verdict.

After due deliberation, the jury returned to the courtroom with the following written verdict:

> We, the Jury, find our verdict for the Plaintiff and award him for general damages, the sum of $10,000.00, and for punitive damages, the sum of $100,000.00.
>
> Kenneth C. Rogers, Foreman.

Whereupon, the Defendant moved to set aside the verdict of the jury and enter a final verdict for the Defendant or in the alternative, to set aside the verdict and award the Defendant a new trial. The Court set dates by which the parties should submit authority and argument with regard to Defendant's motion. On motion of the Defendant agreed to by Plaintiff, the Court subsequently allowed each party three additional days to submit his authority and argument. By agreement of counsel, the Defendant's motion was then submitted to the Court for its decision and after mature consideration, the Court was of the opinion that Defendant's motions should be and were in every respect denied, to which action of the court the Defendant objects.

On April 20, 1978, came the parties again by counsel and the court considered defendant's motion filed on April 19, 1978, for Reconsideration of Defendant's motion for Summary Judgment, etc. After hearing argument of counsel and having duly considered the same the Court doth hereby deny said motion, to which defendant duly objects and excepts.

On the same date last mentioned came the parties by counsel to be heard upon defendant's motion for Remittitur. Upon evidence introduced by the Defendant in support thereof, to which evidence plaintiff objected, and upon the record in this case, and the same was argued by counsel. And the Court thereupon took said motion under advisement.

On the 28th day of April, 1978, came the parties again by counsel and the Court having reviewed portions of the trial transcript doth hereby deny said motion.

It is therefore ADJUDGED and ORDERED that the Plaintiff have judgment against the Defendant, James N. Fleming, in accordance with the aforesaid verdict of the jury in the sum of $110,000.00, plus costs, and interest from December 7, 1977.

And the said Defendant, by counsel, having indicated his intention to petition the Supreme Court of Virginia for an appeal, execution of this judgment is suspended until the Supreme Court acts upon said petition for appeal, and the Defendant, if an appeal is sought, shall within 30 days post an appeal bond with provisions conditioned according to law in the penalty of Twenty Thousand Dollars ($20,000.00), with approved surety. And the transcript is hereby made a part of the record.

ENTER: /s/ David F. Berry

DATE: 4-28-78

Seen and objected to as
to the amount of bond

/s/ Thomas E. Albro

E. Gerald Tremblay
Thomas E. Albro
Tremblay & Smith
105-109 E. High Street
Charlottesville, Virginia 22901
Counsel for Plaintiff

Seen and objected to for all reasons previously stated including failure of court to rule for defendant on motions for summary judgment, motion to strike, motion to set aside, etc.

/s/ Gerald G. Poindexter

Gerald G. Poindexter
Greene & Poindexter
304 West Cary Street
Richmond, Virginia 23220
Counsel for Defendant

Objected to for reasons previously stated

/s/ Charles Edward Carter

Charles Edward Carter
1790 Broadway
New York, New York 10019

APPENDIX B

JAMES N. FLEMING,

Appellant,

against

W. BEDFORD MOORE, III,

Appellee.

Record No. 781061

March 6, 1981

221 Va. 884, 275 S.E.2d 632

COCHRAN, J., delivered the opinion of the Court.

W. Bedford Moore, III, initiated this libel action against James N. Fleming in the court below. Final judgment was entered by the trial court on the jury verdict awarding Moore $10,000 in compensatory damages and $100,000 in punitive damages.[1]

Moore was a white, tenured, assistant professor in the Humanities Division of the School of Engineering at the University of Virginia during the 1975-76 academic year. His residence known as "Shack Mountain", located in Albemarle County, has architectural significance because of its Jeffersonian styling. The Moore land adjoined a tract known as "Evergreen", owned by Fleming and others and situated near the Rivanna Reservoir.

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1 During oral argument, a motion to dismiss for failure to remedy defects in the appeal bond was renewed. On February 21, 1979, when the appeal was awarded, bond was set by this Court at $120,000. On March 6, 1979, the Clerk of the Circuit Court certified that Fleming had appeared before her and given bond in the amount of $120,000 with approved surety. We therefore overrule the motion to dismiss. See Code § 8.01-676; Rule 5:31.

Fleming, a black real estate broker and developer, sought approval in the fall of 1974, first from the Planning Commission and then from the Board of Supervisors of Albemarle County, to have "Evergreen" rezoned from Agriculture to Residential Planned Unit Development. Upon rezoning, Fleming proposed to construct a planned unit development of high-density residential units for a predominantly black, lower-middle-income group of occupants.

The Planning Commission and Board of Supervisors held several meetings to consider Fleming's application and Moore spoke briefly during two of the meetings in opposition to the proposed development. Moore's position was that the project, if constructed, would create a pollution hazard to the Rivanna Reservoir, which supplies water to the City of Charlottesville, and that it would also detract from the value of his own property. Moore never gave interviews to the press concerning the planned development and never spoke about in public except at the two meetings. During the course of public debate over the proposed development, county planning officials advanced the idea that if Fleming's application for rezoning were to be approved, a tree buffer should

be required along the boundary line between the "Evergreen" and "Shack Mountain" properties. Moore felt that the buffer would be a good idea since it would screen his property from the "Evergreen" development. Fleming's plan was reviewed by the appropriate county agencies, the public was afforded an opportunity to comment on it, and his application for rezoning was subsequently denied by the Board of Supervisors in December, 1975.

In January, 1976, Fleming published in two newspapers a paid advertisement captioned "RACISM" in which Moore was identified by name. The advertisement appeared in the Charlottesville-Albemarle Tribune, a newspaper of general circulation in the community, on January 8, 1976, and in The Cavalier Daily, a university student newspaper, in its January 15 and 16, 1976, editions.[2]

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2 The advertisement appeared in print as follows:

(Paid Advertisement)

RACISM

I have endeavored to realize the opportunity

(Footnote cont.)

(Footnote cont.)

to provide housing and pleasant surroundings for working people--the sort of people who made this the great country that it is.

I do not expect any Farmington members to buy my houses. The tenured position-holders who live off the public dole at the expense of the working people are already well-housed, and could not be expected to live in a racially-integrated neighborhood, anyhow.

There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monticello upon the hilltop overlooking the developing community we have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little Monticello does not want any black people within his sight.

There is a great conflict waging between the haves and the have-nots. Obviously we have created too much financial security for the tenured segment of the economic community whose greed is repeatedly shown by their expression of "I've got mine--too bad about you."

I am a lover of liberty and freedom of opportunity. I cannot stand by and see the have-nots oppressed by the no-growth people

(Footnote cont.)

Claiming that the article injured his reputation in the university community, Moore brought this action for libel.

[1] The first issue on appeal is whether the trial court erred in ruling, as a matter of law, that the article was defamatory per se and in submitting the issue of liability to the jury upon such a theory.[3] At trial, counsel for Fleming

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(Footnote cont.)

> who are living off of our work. I know that this Country did not achieve the highest living standard in the world by no-growth or by oppression of the working man, and yet today the opportunity to improve one's living standard is being violently opposed by the same people who oppose my proposed neighborhood.
>
> Pollution of the reservoir is being used as the current excuse to foster no-growth. The solution, of course, is to remove the guaranteed incomes of these greedy people and put them in the position of seeing the world through the eyes of one seeking the opportunity to improve his or her living standard. Only then would they admit that the pollution excuse is a sham.
>
> I will develop Evergreen, and a lot of people will benefit from it.
>
> SIGNED: JAMES N. FLEMING

3 It is unclear from the record whether the jury was told that the article, if defamatory at all, was defamatory per se.

(Footnote cont.)

conceded that the trial court, rather than the jury, should determine whether the article was libelous per se, but he objected to the determination made by the court.

Unlike most states, Virginia makes no distinction between actions for libel and those for slander. Shupe v. Rose's Stores, 213 Va. 374, 375-76, 192 S.E.2d 766, 767 (1972); see Note, Defamation in Virginia--A Merger of Libel and Slander, 47 Va. L. Rev. 1116 (1961); W. Prosser, Torts § 112,

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(Footnote cont.)

The Appendix includes Instruction No. 8, which so provided, marked "given" by the trial court. Although the transcript records the reading to the jury by the trial court of all other Instructions marked "given", it fails to show that Instruction No. 8 was so read.

Assuming, however, that Instruction No. 8 was not given, we conclude that the trial court submitted the case to the jury upon a theory of per se defamation. Other instructions informed the jury that Moore was presumed to have suffered general damages, and that the absence of actual injury was to be considered only in diminution of damages. The presumption of damages is the critical distinction between defamation per se and other actions for defamation. See Shupe v. Rose's Stores, 213 Va. 374, 376, 192 S.E.2d 766, 767 (1972); Slaughter v. Valleydale Packers, 198 Va. 339, 346-48, 94 S.E.2d 260, 266 (1956). Since the jury instructions allowed the jury to presume damages, the case was presented to the jury on the theory of per se defamation even if Instruction No. 8 was not given.

at 763 n. 33 (4th ed. 1971). We have held that actions for libel are treated as actions for slander, and that the common-law rules of slander are applicable, so that alleged defamatory language is actionable according to the following principles:

> At common-law defamatory words which are actionable per se are:
>
> (1) Those which impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Those which impute that a person is infected with some contagious disease, where if the charge is true, it would exclude the party from society. (3) Those which impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment. (4) Those which prejudice such person in his or her profession or trade. All other defamatory words which, though not in themselves actionable, occasion a person special damages are actionable.

Shupe, 213 Va. at 376, 192 S.E.2d at 767, quoting Carwile v. Richmond Newspapers, 196 Va. 1, 7, 82 S.E.2d 588, 591 (1954).

Racism, of course, is neither a contagious disease nor a criminal offense for which a person may be indicted and punished. Thus, a finding of per se defamation in the present case could only be based upon the effect of the allegation upon the plaintiff's work. The trial court ruled, as a matter of law, that the allegation of racism prejudiced Moore in his profession.

To be actionable without proof of "special damages", we have held that the words must contain an imputation that is "necessarily hurtful" in its effect upon plaintiff's business and must affect him in his particular trade or occupation. James v. Haymes, 160 Va. 253, 261-62, 168 S.E. 333, 336 (1933). Accord, W. Prosser, Torts § 112, at 758 (4th ed. 1971) ("defamation of a kind incompatible with the proper conduct of the business, trade, profession or office itself"). There must be a nexus between the content of the defamatory statement and the skills or character required to carry out the particular occupation of the plaintiff. Restatement (Second) of Torts § 573, Comment e (1976). For example, because an attorney is required to adhere to the disciplinary rules, charging an attorney with unethical conduct is defamatory per se. Carwile, supra,

196 Va. at 8, 82 S.E.2d at 592. The words themselves must necessarily be damaging to the attorney in his profession.

Not every defamatory statement, however, is "necessarily hurtful" to a plaintiff's business and touches the plaintiff in his special trade or occupation. The allegation that a person has refused to pay a money debt is not per se defamatory if that person is not engaged in a vocation in which credit is necessary for the proper and effectual conduct of his business. M. Rosenberg & Sons v. Craft, 182 Va. 512, 519, 29 S.E.2d 375, 378 (1944). Accord, Weaver v. Finance Company, 200 Va. 572, 106 S.E.2d 620 (1959). Likewise, written notice that credit is being denied to a bookkeeper-secretary does not touch the plaintiff in her special trade or vocation. See Shupe, supra. That a defamatory statement may have had an adverse impact upon a plaintiff's work does not make that statement per se defamatory where the defamation is not "necessarily hurtful" to the plaintiff's business and does not touch the plaintiff in his special trade or occupation.[4]

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4 "Thus, a statement that a physician consorts with harlots is not actionable per se, although a charge that he

(Footnote cont.)

Because libel actions in Virginia are governed by common-law rules applicable to slander actions, libel cases from other jurisdictions are not helpful.[5] There are analogous cases, however, holding that slanderous imputations of Communism do not touch the individual in his chosen profession. See, e.g., Kory v. International Telephone & Telegraph Corp., 444 F. Supp. 193, 196 (S.D.N.Y. 1978) (allegation that journalist, a former ambassador, was a Communist held not to be slanderous per se); Gurtler v. Union Parts Mfg. Co., 1 N.Y.2d 5, 150 N.Y.S.2d 4, 132 N.E.2d 889 (1956) (allegation that an engineer was a Communist held not to be slanderous per se).

(Footnote cont.)

makes improper advances to his patients is actionable." The former statement does not necessarily affect his reputation as a physician but the latter directly affects it. Restatement (Second) of Torts § 573, Comment e (1976).

5 Although Annot., 33 A.L.R.2d 1196, § 15 (1954 & Later Case Service) details many cases concerning allegations of racial intolerance, most of the cases concern libelous, not slanderous, statements. In most jurisdictions, libelous statements are actionable without special damages even though they do not touch the plaintiff in his particular trade or vocation. As we have already noted, Virginia does not distinguish between slander and libel actions.

[3] In the present case, Fleming charged Moore with not wanting blacks to reside within sight of his home, but the allegation of racism was not made in the context of Moore's employment as a teacher.[6] We conclude that, while the allegation might have adversely affected Moore's work, the statements did not necessarily affect him in his particular profession and consequently were not defamatory per se. We hold, therefore, that the trial court erred in ruling that Fleming's advertisement was defamatory per se in that it necessarily was hurtful in its effect upon Moore's employment and adversely affected Moore in his capacity as a teacher. The consequence of this erroneous ruling, requiring reversal and remand for a new trial, was that the jury was allowed to presume general damages and also to award punitive damages based on the presumed damages.

Since this case must be remanded for a new trial, we will resolve other issues that otherwise may arise again upon retrial.

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6 The advertisement did not allege, for example, that Moore discriminated against the black students in his classes.

[4] Fleming contends that Moore was a public figure and thus could not recover damages for defamation in the absence of a showing that the statement was made with "actual malice", that is, with "knowledge that it was false or with reckless disregard of whether it was false or not", as defined in New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

The Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974), provided the following description of a public figure:

> For the most part those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

[5] Moore, a teacher at the University of Virginia, did not occupy a position of "such persuasive power and influence" that he could be deemed a public figure "for all purposes". Thus, we need only determine whether because of his activity relative to the "Evergreen" proposal he was a public figure for that limited purpose.

We do not believe that Moore's role in the public hearings concerning "Evergreen" merits his classification as a public figure. Gertz cautioned that a court must focus upon the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation". 418 U.S. at 352. The mere fact that Moore spoke twice in public hearings concerning the "Evergreen" proposal is not determinative since his use of the public forum substantially resulted from his desire to protect his private interests. In Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Court held that resort to the judicial process in order to vindicate private rights did not make the plaintiff a public figure. This reasoning appears equally applicable here, where Moore resorted to an administrative body in order to protect the value of his own residence. Moreover, like the plaintiffs in Wolston v. Reader's Digest, Inc., 443 U.S. 157, 167 (1979), and Gertz, Moore never discussed the "Evergreen" proposal with the media. He did not attempt to organize or lead opposition to "Evergreen". Since Moore's involvement at the public hearings was in his capacity as an adjoining private landowner whose property might be affected by the proposed development, we

conclude that he was not a public figure. Therefore, he was not required to show, as a prerequisite to recovery of compensatory damages, that Fleming acted with malice that met the New York Times standard.

[6] Fleming further contends, however, that even if Moore was not a public figure, the trial court erred in allowing the jury to award punitive damages on the basis of common-law malice.[7] In Gertz, the Court condemned the awarding of either presumed or punitive damages, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth".[8] 418 U.S. at 349. The award of damages without proof of "actual injury"[9] was

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7 The court instructed the jury in Instruction No. 9 that punitive damages could be awarded if the jury believed from a preponderance of the evidence that Fleming acted with "actual malice", that is, that he "was motivated by revenge, personal spite, ill will or a desire to injure the Plaintiff".

8 Since we have ruled that Moore may not recover presumed damages because the article was not libelous per se, we do not reach Fleming's contention that Gertz would prohibit the awarding of presumed damages without a showing of knowing falsity or reckless disregard for the truth.

9 The opinion noted that damages for "actual injury" are not limited to out-of-pocket loss, and that trial courts are

(Footnote cont.)

condemned as "invit[ing] juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact". Id. On the basis of Gertz, we vacated an award of punitive damages entered against a publisher where the award was based upon a finding of common-law malice, and held that it was necessary to show knowledge of falsity or reckless disregard for the truth by "clear and convincing evidence" before punitive damages could be awarded. Newspaper Publishing Corp. v. Burke, 216 Va. 800, 805, 224 S.E.2d 132, 136 (1976). Gertz, however, did not explicitly extend its rule to non-media defandants. Indeed, the Supreme Court has recently noted that it has not resolved whether the First Amendment requires application of the New York Times rule in cases involving non-media defendants. Hutchinson v. Proxmire, 443 U.S. 111, 133-34 n. 16 (1979).[10]

(Footnote cont.)

permitted to compensate for impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Awards must be supported by competent evidence, although it is not necessary that the evidence assign a dollar value to the injury. 418 U.S. at 350.

10 Lower courts are divided on whether the First Amendment protections provided media defendants in New York

(Footnote cont.)

Since Fleming is not a media defendant and Moore is not a public figure, Gertz does not control the present case. Nevertheless, we share the concern expressed in Gertz at the assessment by juries of punitive damages "in wholly unpredictable amounts bearing no necesssary relation to the actual harm caused". 418 U.S. at 350. Therefore, we hold that any instruction on punitive damages must be structured upon the same standard of proof of "actual malice", as defined in New York Times, applied in Gertz, and followed in

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(Footnote cont.)

Times and Gertz are applicable to non-media defendants. Several courts have refused to extend Gertz. Rowe v. Metz, 195 Colo. 424, 579 P.2d 83 (1978), rev'g 39 Colo. App. 20, 564 P.2d 425 (1977); Gengler v. Phelps, 92 N.M. 465, 589 P.2d 1056 (1978); Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 568 P.2d 1359 (1977); Calero v. Del Chemical Corp., 68 Wis.2d 487, 228 N.W.2d 737 (1975). Other courts have refused to distinguish between the protections afforded media and non-media defendants. Bryan v. Brown, 339 So.2d 577, 583-84 (Ala. 1976), cert. denied, 431 U.S. 954 (1977); Millsaps v. Bankers Life Company, 35 Ill, App. 3d 735, 342 N.E.2d 329 (1976); Jacron Sales Co. v. Sindorf. 276 Md. 580, 350 A.2d 688 (1976), aff'g 27 Md. App. 53, 341 A.2d 856 (1975); Ryder Truck Rentals v. Latham, 593 S.W.2d 334 (Tex. Civ. App. 1979). See J. Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1417 (1975), predicting extension by the Supreme Court of Gertz to defamation suits against non-media defendants where the defamatory falsehood was published by the press.

Burke, that is required in defamation actions against media defendants, i.e., clear and convincing proof of knowledge of falsity or reckless disregard for the truth.

[7] In conformity with the general rule in tort actions, no punitive damages may be awarded for slander or libel unless compensatory damages are awarded. As an exception to the rule it is generally held that in a slander or libel action, where the defamation is actionable per se, punitive damages alone may be awarded. We approved the rule and the exception in Burke, supra, 216 Va. at 805, 224 S.E.2d at 136. As the advertisement in the present case was not actionable per se, the exception is not applicable.

[8] Moore did not allege or prove that he suffered any monetary loss. He did allege, however, that he had been insulted, mortified, held up to ridicule, and humiliated by the statement. We conclude that in libel actions not based upon per se defamation, where knowing falsity or reckless disregard for the truth is not shown, the compensatory damages should be limited to the actual damages proved to have been sustained, but such damages should not necessarily be restricted to out-of-pocket loss. See fn. 10 supra. Therefore, we

hold that Moore is entitled to recover compensatory damages upon proof of actual injury, including such elements as damage to his reputation and standing in the community, embarrassment, humiliation, and mental suffering. "Special damages", which under the common-law rule must be shown as a prerequisite to recovery where the defamatory words are not actionable per se, are not to be limited to pecuniary loss. To the extent that language in Shupe may be construed to indicate that emotional upset and embarrassment cannot constitute "special damages", it is hereby modified.

For the reasons assigned, the judgment of the trial court will be reversed and the case remanded for a new trial consistent with the views herein expressed.

Reversed and remanded.

HARRISON, J., dissenting.

I find the jury's awards totalling $110,000 in this case to be shocking. It is inconceivable that a respected professor, as is Mr. Moore, could have been damaged in the University community or elsewhere by the "advertisement" which appeared at the behest of Mr. Fleming.

I attach little significance to the word "racism" which heads the advertisement. The words "racism" and "racist" are bandied about in our society with complete abandon. People of all races currently utilize these terms to voice their innumerable real and imagined grievances. Indeed, it would not be difficult to find a newspaper which contains a complaint by one party against another for some action allegedly grounded in "racism", or "reverse racism."

When we examine the advertisement inserted in the papers and strip therefrom Fleming's self-laudatory and hortatory language, we find that he takes a dim view of Farmington members and tenured professors and feels that without their financial security they would be more sympathetic to the "have nots." The advertisement then makes a comparison between Thomas Jefferson and Professor Moore in which the latter emerges "second best." Fleming attempts to make his point by stating that Jefferson located his slave quarters in sight of Monticello, whereas Moore does not want black people in his sight. This apparently refers to Moore's approval of the suggested location of a tree buffer or screen between his property and Fleming's proposed development.

The advertisement is in bad taste and is ill-mannered, short-tempered, and indiscreet. It is poorly conceived and intemperate diatribe by an irate, disappointed, and frustrated black real estate developer who believes that his white opponent in a rezoning matter is not as concerned with pollution as he is apprehensive over the prospect of a "predominantly black, lower-middle-income" development adjoining his property. However, this reaction by Fleming was predictable and could well have been anticipated by Professor Moore when he left the academic community and entered the realm of real estate development and the controversial arena of zoning. The language of the market place is not always restrained, reasonable, or temperate. It is often sharp and unfair, and sometimes raucous, biting, and cruel.

Although the indignation of Professor Moore is understandable we should not allow the publication involved here to be the predicate of an action for libel and an award of damages. I would enter final judgment for the defendant.

APPENDIX C

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING

Defendant.

Law No. 976-L

October 7, 1982

Transcript pages 28-38

that, Mr. Poindexter? Until we hear the evidence, or is there something in the interrogatories or the pleadings that would indicate it?

MR. POINDEXTER: Yes, sir, we believe there's ample record for the Court not to conclude that a prayer for punitive damages is not permitted in this case, given the record backdropped against the opinion of the Supreme Court. There is no way, if Mr. Moore does not intend to radically depart from the evidence that was given, that the trier of fact could find a deliberate misconstruction of the truth or an utter wanton disregard for the truth of anything that Mr. Fleming said and that throws aside all the questions of privilege and everything else. And at some point such a absurd claim should be disposed of so that it does not clutter up whatever remains in this case. But punitive damages - punitive damages are simply not in this case.

THE COURT: Did the Supreme Court address that in anyway in its opinion?

MR. PHEMISTER: Yes, they did, Your Honor. On page ten of the opinion they talked about the punitive damage claim. I hope I'm referring you to the right page. Yes. The court said, on the basis of Gertz, we vacated an award of punitive damages entered against a publisher where the award was based upon a finding of common law malice and held that it was necessary to show knowledge of falsity or reckless disregard for the truth by clear and convincing evidence before punitive damages could be awarded. Newspaper Publishing Corp. against Burke.

THE COURT: Then it goes on to deal nonmedia defendants, which is what we have here. Since Fleming is not a media defendant and Moore is not a public figure, Gertz does not control the present case, nevertheless we share the concern expressed in Gertz at the assessment by juries of punitive damages, in holding unpredictable amounts bearing no necessary relation to the actual harm caused. Therefore, we hold that any instruction on punitive damages must be structured upon the same standard of proof of "actual malice" as defined in New York Times, applied in Gertz and followed in Burke that is required in defamation actions against media

defendants. That is they're saying now that they have not previously applied it to nonmedia defendants but they're now extending the rule to nonmedia defendants so they're saying.

MR. PHEMISTER: I think in anticipation of the Supreme Court ruling, the United States Supreme Court's ruling, but they have said that the same standard applies with nonmedia defendants as media defendants, and therefore Gertz in fact does control the case. And the other part of the motion on the punitive damage claim really ties into the motion to dismiss. You'll notice in the reference back on page ten, up at the top right before the portion of the paragraph that I was reading the Virginia Supreme Court is discussing the Gertz Case and the Virginia Supreme Court notes that the award of damages without the proof of actual injury was condemned, when they say was condemned they mean by Gertz and here they are quoting the Gertz Opinion, inviting juries to punish unpopular opinion rather than to compensate individuals for injuries sustained by the publication of a false fact. Now, if you had to crystalize the libel in this case, the contended libel on the part of the Plaintiff you would have to say that it's a claim on the part of the Plaintiff that he has

been called a racist and if we take that for the purposes of our argument as the libel and boil it all down and say this is what it really means, this is what we argue to the jury that the libel was, that Mr. Fleming called Mr. Moore a racist. We submit to the court that not only is this case subject to a Motion to Dismiss it also is not a case for punitive damages because there is no false fact. If I call you a racist it's a statement of opinion, with Your Honor's permission, and what I think is a racist may differ from what Mr. Moore thinks is a racist. He may take deep umbrage at a comment that I consider not demeaning in any shape or form and because it is an unquantifiable subjective consideration it is not a fact, it cannot be false and we contend cannot be the subject for punitive damages or for that matter libel.

THE COURT: Why wouldn't the Supreme Court then have reversed the case and entered final judgment?

MR. PHEMISTER: The minds of the Supreme Court Your Honor is something that we can only hope to...

THE COURT: Why should I do the job for them at this stage? I think I have already made that comment. They had the opportunity to reverse and enter final judgment

and didn't and you are now saying this court should do it behind the Supreme Court without trying the case aren't you?

MR. PHEMISTER: No Your Honor, I wouldn't characterize my remarks that way. I think in fact the Supreme Court shows an error or ground on which to reverse it, perhaps looking for some clarification but I don't see what that clarification could be. I think the case is right at this point.

THE COURT: I am not going to require any further argument on that point. I took it up with Mr. Poindexter when this case first arrived back at - in this court and we spent a considerable amount of time and I made a ruling on that and indicated that the Supreme Court if it had chose to could have, for whatever reasons it might have found appropriate, dismissed and entered final judgment. In fact, the dissenting opinion indicated it should have been; but it is not up to this court to do having tried it once and the Supreme Court having reversed it and sent it back for retrial. The only thing I can do is rule that it's available for retrial unless the plaintiff has in some way gotten himself in a different position since the case was sent back for retrial and

not having such information I therefore overrule the motion for dismissal and also with respect the issue of punitive damages. I don't see how the case can suddenly take a turn different from what it was when it was sent back here from the Supreme Court. I do have grave misgivings about the posture of the case when you get to that stage. I think it would have to be based on the evidence and until the evidence is actually presented to me and the court evaluates the evidence it would be inappropriate to rule on this question of punitive damages. I think a Motion to Strike would be the appropriate place for that to again be considered.

MR. POINDEXTER: Your Honor, may I just ask a question for clarification?

THE COURT: Yes sir.

MR. POINDEXTER: That is the value of Mr. Phemister's thought in this because it had kind of escaped us to the point that he introduced it. If you call somebody a thief you can prove it, you can go out possibly and get a record and show that what you said is the truth. If you say somebody has a veneral disease it's possible that you could go back and get records and prove that; but if Mr. Fleming or I

should call someone a racist there is no way that what I said could be disproved and there is no factual way that I could really prove that to the satisfaction of everybody so it becomes not a fact but a highly subjective value judgment. For example, there was an article, an editorial, in the Progress Index under the broad heading Racism in the Reservoir and it took to task Mr. Fleming and Saad El Amin who was known at that time as JeRoyd Greene for introducing, even daring to introduce the thought that someone in this area was discriminating against Mr. Fleming because he was black and it concluded by saying that perhaps the persons who make this accusation are guilty of racism or whatever. Now, I can't imagine that that kind of editorial would give rise, or would have given rise to a cause of action. Just like I could not imagine that that article that Mr. Fleming had put in the newspaper would have caused us the consternation that it has; but whether Mr. Fleming and Mr. Saad El Amin were indeed were racists was simply a perception of that editorial writer down here at the newspaper and whether Mr. Moore is a racist, we say we never called him that, but if he insists that we have called him that so what, it is at Mr. Fleming's

perception and Mr. Fleming could probably see all the evidence in the world and not be detered by it; but it cannot be proven or disproven in any objective quantification that a jury or tryor of fact can say this is it, he is not a racist, he is a racist, give him some money, don't give him some money and that is the reason that we believe that this lawsuit has simply run out of steam and it should not be allowed to linger - it has been around now for seven - six years and we are no closer to a resolution of this thing than we were six years ago and there has been the intervention of a case recently coming out of the boycotts of Mississippi, NAACP versus Claiborne which adds greater value to the value coming to our right of free speech and exchange of ideas and we just believe firmly that Mr. Fleming had a First Amendment Right to say what was said and that a court, without putting us to a jury, should put an end to this lawsuit. If Claiborne is the case that does it then Claiborne is indeed the case and we believe that Your Honor should, despite what the Supreme Court may have said, take up the implications of the most recent decision in this area by the United States Supreme Court and rid us of the uncertainties of this lawsuit.

THE COURT: Well, are you saying that that was not presented to the Supreme Court, was not taken as an exception or one of the basis of the appeal? The term itself was one that could not lend itself to an action. What does the dissent say?

MR. POINDEXTER: Dissent is what we say.

THE COURT: Yes. Why should this court follow dissent? You are asking this court to reverse the Supreme Court and file a dissent. Sometimes we are often tempted but it's not done. It's not the law. Now, I had this question addressed in the Palumbo Case and I did considerable research, I might not have written a very long opinion but I recall the great deal of attention that was given to this question of opinion as opposed to fact. Mr. Albro, was there a written opinion from this court in that case? On the preliminary motion?

MR. ALBRO: Yes sir.

THE COURT: I may have to retreive it and look at it again but a lot of attention was given this very point that Mr. Phemister and Mr. Poindexter now raise and that is it was not a false allegation of fact but rather one

of opinion, a question of mixed fact of opinion and I commented in my ruling on that very aspect of that Palumbo case, it didn't get to trial, it was settled wasn't it?

MR. ALBRO: Yes, it was settled.

THE COURT: That was a very strong point made by the attorneys for the, what was it, television station?

MR. ALBRO: Channel Six.

THE COURT: I may want to look at that but I have made my ruling and I certainly am always open to taking the second look which I will do and I note your position as to the difference between fact and opinion; but the problem that I have with it is that again we come back to this question of characterization of the terms that the Supreme Court had an ample opportunity to deal with. Let's look at Justice Harrison's Dissent. I think we dealt with a number of cases that were not in this Commonwealth when we dealt with this question of fact and opinion; and cases from all over the country were analyzed in that context and I'll review that further and let the judge who may try the case have the benefit of that research and the memoranda on each side. It

is never put to rest but I think anytime a judge enters final judgment, or what amounts to a determination of the merits of the case until the evidence is before the court, has to be based entirely on the pleadings and the answers and responses to interrogatories and I can't see how again that would be a new ingredient that would allow this court to dismiss a case at this stage which has been sent back for retrial.

MR. POINDEXTER: Your Honor, I asked Mr. Moore this morning to name some racists and he earlier named Andrew Young and he said Senator Bilbo and the late George Lincoln Rockwell. But I would think that those persons were not necessarily racists in the eyes of all persons who preceded them and that just shows some of the difficulty that is associated with trying to quantify and talk in objective terms about a racist. Mr. Albro could be a racist to me but he may not be to Mr. Phemister and we would have our different points as to why Mr. Albro is a racist but we would never resolve that and it's unfair to try to put such a vague question to a tryor of fact and that of course gives us a problem in damages, even if we agree that this is an article which has harmed this gentleman. Another one was published

in the Tribune a week before that and he was harmed by that, he said about equally; and he has filed a million dollar lawsuit based upon that. He filed a million dollar lawsuit over here, they are right across the street. Now, how does he distinguish between what harm he felt, what injury, what emotional stress, what suffering he has experienced from the Cavalier Daily article which was published twice as opposed to the Tribune article? He told us this morning that the Tribune article had an impact, probably a greater impact in the black community, among his black friends; but you can't distinguish for the jury in a certain sense what harm the Cavalier Daily article did as opposed to the Tribune article and it has been an old teaching that when damages and injuries are so vague they cannot be ascertained you have no case.

THE COURT: Mr. Poindexter, I have made my ruling and I'll merely note this for the benefit of your objection and the record which will have to be preserved, if it's appropriate, and that is, the evidence presented had it not been for objective testimony may well have caused the court to sustain a motion to strike, had it been entirely subjective

by the plaintiff your point would be well made but as I recall the evidence and certainly the plaintiff has a right to bolster his case with evidence there was objective testimony to the effect that this term used in the context of the University of Virginia Campus at the time when used was more than subjective damage. People who were in positions to testify I suppose almost as an expert and I recall specifically the former President of the University of Virginia in dealing with the position of a faculty member being termed a racist on his campus. Now, that was the evidence. I would certainly agree with you that in the vague sense and out of the context of the surroundings that these words were uttered in you may have an entirely different result just as the old classic case, you can yell fire on the street, that 's one thing; if you yell fire in a crowded theater it's another and that's exactly what this case according to the evidence went to the jury on and I have no qualms about your position that subjective reaction is not necessarily compensible. It has to be based in objective criteria and in this case if the plaintiff doesn't provide it then he is always subject to a motion to strike, as was the other case and I think I refused to sustain a Motion to Strike

based upon the fact that it was not his own reaction to it, it was the objective evaluation of his position as a faculty member at the time the utterance was made in the context of the student body and this being a student newspaper. I think I made the comment had it been published in some other publication which was not normally circulated on the campus, not primarily designed to be circulated on the campus, you certainly would have had a different situation. I certainly made a distinction between a normal publication and that which in effect searched out the plaintiff within his own area of work. That was the basis upon which the evidence came in. I don't

APPENDIX D

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

October 21-22, 1982

Transcript pages 373-87,
514-23

matter up now then.

MR. ALBRO: All right, sir, I think that is actually something that was going to be reserved for a motion to strike if that's what you want to take up at this time.

THE COURT: All right, if there's nothing else then other than the motion to strike and with the reservation of putting on evidence as to the wealth of the defendant in the event the plaintiff prevails in his contention the Court is prepared to release the jury and hear the motion to strike if there is one.

MR. POINDEXTER: Yes sir.

THE COURT: All right, bring the jury back in. All right, ladies and gentlemen of the jury, you need not get settled back down into your seats, we're going to release you now with the request that you be back in the morning at 10:00 to resume this case. The attorneys and the court will proceed to take care of some matters which you are not needed for. So you are now excused until tomorrow morning at 10:00. Let me remind you, however, not to discuss this case or allow anyone to discuss the case with you during the

time that you are recessed. You may withdraw. All right, the jury has withdrawn.

MR. POINDEXTER: May it please the court, Your Honor, first we would respectfully submit that given all the ... all the evidence heard in this case today, no case framed against the context of, framed against the decision of the court in this case previously. No case has been made out to go to the jury, because the case includes Mr. Fleming's own recital which would rebut any suggestion of wrongdoing on his part which would give rise to the cause of action. It would seem that the plaintiff has had to show to this point at least by a preponderance of the evidence of defamation, a libel. Other than conclusionary allegations on the part of the plaintiff, first of all missing from that is the component of damages. Now, Mr. Moore has testified as have his witnesses that there was no damage. That would have to be a necessary component of his case. There is not enough in simply saying that I was distressed, simply saying that I was greatly embarrassed, that is not enough under the measure or the test provided in Fleming v. Moore to allow a jury at this point, if we did nothing else to speculate on the worth of his case.

The other part of it is that we would have to insert again our right to say things, though they might have fallen unpleasant, though they might have given rise to anger on the part of Mr. Moore. Mr. Fleming has a constitutionally protected right given all those circumstances that we now know comprised the conflict between these two men to say what he believed to be true as it concerned him at that time. If Your Honor would have had an opportunity to research some authority, I doubt whether you would have found any case with an unsettled judgment wherein the allegation was that someone was called a racist or someone suggested that that person was inflicted with race as a standard for libel. We have found no such authority. Perhaps Mr. Albro can suggest something to the court but you have to view the assertion by Mr. Fleming that the claim of race is within the context of what happened to him and how Mr. Moore was involved directly or indirectly in that occurrence. And the case has to be weighed in that light and then insert in that measurement this first amendment protection. The first amendment protection runs whether or not he is a public figure, but if he is a public figure as we submit that he must be found to be at

this point, the burden becomes one of showing by clear and convincing evidence that Mr. Fleming purposely lied or was so reckless in what he said about the man until it was tantamount to a lie. And if you measure, if you take that test and measure it against what is the evidence in this case you cannot, you cannot come to such a conclusion given the, certainly given the higher test, not even given the minimal preponderance test because what he said must be measured in a subjective rather than objective sense. If he believed what he said was true that's sufficient. Whether it was true or not, he made a mistake, he's not responsible for it. There must be some culpability. He's not punished in a libel case for negligence, he is punished for a malicious state of mind. And there's simply nothing in here to that effect. Here's a man who saw his dreams for his subdivision out there abolished in effect by what he perceived as the racist conduct of Albemarle County officials who were encouraged and abetted by citizenry all of whom suddenly rose up when he as a black person tried to initiate a development in an area where he had seen white developers develop their property, sell their property, encroach upon the reservoir and all at once he is

swamped by these claims of pollution, he is swamped by a house suddenly being designated a historic landmark that's only forty some years old despite the fact that I'm sure it is a significant piece of architecture. He is swamped by all sorts of concerns that have never before been expressed in this community. It was not unreasonable under those circumstances for him to have lashed out in the fashion that he did in the ad which was published in The Cavalier Daily on January 15th and 16th, 1976 and in order to go forward at this juncture, Your Honor, it would seem that you would have to find that there is some room for him to have told, intentionally told a falsity and that simply is not evidence in this case. Given the fact that he's testified that, believed it then, believes it today. And we submit that at this point the case should not be submitted to a jury on any grounds and, of course, that would mean that we would have to have not to respond to it beyond the response that has been elicited through the examination of these witnesses. There is no burden upon us.

THE COURT: All right, Mr. Albro.

MR. ALBRO: Thank you, Your Honor. Your Honor, I think perhaps the way to approach this issue is to consider the law and what we're going to have to ultimately instruct the jury. I state for the record only because I think it should be stated not because Your Honor doesn't know, obviously at this state all of the evidence that was admitted must be viewed in the light most favorable to the plaintiff. And all proper inferences that could be derived therefrom must similarly be so viewed and having said that the issue that confronts us now is have we made such claim as to create the jury question. Have we put on such evidence that is so as to have created a jury question on the key issues. The first issue in the case is did the defendant make the statements complained of in the advertisement. That, of course, is not denied, that's a given. The second issue is if he did, were they seen by someone other than the plaintiff. And we have had such testimony. That is not an issue. The third are the statements about the plaintiff. The plaintiff is the only living human being referred to in that ad and as we know from his testimony and that of others there are

numerous references in that ad that relate back logically and directly to the plaintiff. That's not an issue. The fourth issue, are the statements false? This is with particular reference to the charges of racist behavior and racism. Of course there is a dispute between the parties as to that, but the issue is at this juncture is the defendant entitled to strike our evidence, have we not shown falsity. We have shown falsity. We have shown falsity in two contexts. First we have shown clearly and unequivocably Bedford Moore is not in general a racist, and I'm not going to regale the court with the specifics of the testimony. But suffice it to say those who have known him intimately and well, socially and professionally recoil the notion that this man harbored any ill will against any person because of the color of his skin. It is false that he is a racist. It is false that he is an adherent of racism, both of which charges are leveled against him in the ad. Are the charges leveled against him false specifically with reference to this project. And again viewing our evidence in the light most favorable to us, the answer is undeniably yes, we have shown they are false. He was never at any time, in any context motivated by the race of the applicant, nor was

he motivated at any time in any context by the race of those persons who might possibly live in Evergreen were it ever developed. I think particularly on this issue is the testimony of Mr. Murray. Because apart from anybody else in this case Mr. Murray occupied a confidential relationship with Mr. Moore, and he was bound by a professional privilege. And at that time Mr. Moore could have said anything of any kind and expressed his true feelings about Mr. Fleming and his development, and Mr. Murray didn't even know the man was a black man until he went to the Planning Commission and found out quite by surprise that he was a black man. Although he had met with Mr. Moore once alone and once with Henderson Heyward, it never came up. The simple fact of the matter is that he has never at any time done anything with respect to this defendant or his planned development that was in any way shape or form racist or based upon an adherence to some form of racism as that has been defined or defamatory. I think first, in the first instance that's really been taken away from us by the Supreme Court of Virginia. If they weren't defamatory they would have reversed it in their final judgment because the self same ad in every

particular was a front argument when we took this case down to Richmond on appeal from the first trial. Albertus Harrison dissented, he was out voted I think five to one, and the grounds of his dissent was that it was not actual, it was not defamatory and he prevented final judgment. He stood alone. I think the Supreme Court of Virginia has ruled that it's defamatory, because if it weren't we wouldn't be here. But suffice to say we're going to have to instruct the jury on the issue nevertheless. I don't suggest we take that away from them. But that is peculiarly a jury issue. The definition of defamation is does it hold the man up to public contempt, scorn and ridicule. That is a decision that is made by the jury in the context of this community bringing to bear their common experiences and understandings of terminology as members of the community. It is simply no way that issue could be taken away at this juncture. Did the plaintiff sustain actual injury as a result of the statements, yes, clearly he did, undeniably he did and that hasn't been controverted. Now, I must frankly confess I don't know what Mr. Poindexter is talking about when he says that the testimony is that there's no injury here. The Supreme Court of Virginia in the

majority opinion in Fleming v. Moore concluded we hold, this is at 894 of the 221 Virginia opinion, we hold that Moore is entitled to recover compensatory damages upon proof of actual injury including such elements as damage to his reputation and standing in the community, embarrassment, humiliation and mental suffering. Special damages which under the common law rule must be shown as a prerequisite to recovery where the defamatory rewards are not actionable per se are not to be limited to pecuniary loss. He's testified to humilitation, embarrassment, a stain on his reputation and various other forms of mental anguish. Furthermore, we have, also had testimony that serious questions were raised about this man among people who did not know him initimately, particularly that which was raised by Mr. Elwood. Black persons who were at the University who didn't know him who were suddenly now concerned about who this, what this individual truly thought as a member of this self same university community. Now, insofar as the allegation by the defense that if the defendant believes in what he says there is no case. That is not the law any where in any jurisdiction. Because if it were every person who was ever sued for defamation could

merely walk into court, file an affidavit stating I believe what I said was true, and he'd be entitled to summary judgment. That is not the way it works. We know that insofar as compensatory damages are concerned, we have to prove that he was in some way negligent in his conduct toward this plaintiff. And I think we have shown it in the way he has conducted himself and the way in which he recklessly leveled charges of racism and racist behavior in spite of all the public record and all the evidence that was available to him. That is more than negligence, that is knowledge of falsity and/or reckless disregard for the truth and that is peculiarly a jury question and there's simply no way that we can say at this juncture that a jury question has not been created on that issue. Now, in the Virginia Model Jury Instructions the clear and convincing evidence standard which must be shown as to knowledge of falsity and reckless disregard for the truth which is the standard for punitive damages is defined as production of evidence that simply creates in your minds, referring to the jury, a firm belief or conviction that he has proved the issue. All right, can we say on this evidence, taking it in the light most favorable to the plaintiff that we

have given this jury evidence upon which it could properly reach a firm belief or a conviction that the charges of racism or a racist behavior leveled against the plaintiff by the defendant were made either with the knowledge that they were false or with a reckless disregard for whether they were true or not. And on that score there is more than ample evidence to let this case go to the jury. We know for example by his own testimony that this defendant attended every Planning Commission and Board of Supervisors meeting that occurred before January 15, 1976 on this first and second Evergreen plans. At that time and in those meetings overwhelming evidence from a whole host of sources was introduced to show that this proposed development posed a serious threat to the life of the reservoir. Persons who had no particular interest in Mr. Fleming or race or anything else, persons who lived in the area, persons who lived outside of the area, private groups, citizen groups, individuals, the League of Women Voters, the State Department of Health, the State Bureau of Sanitary Engineering, it's all in those exhibits and it just goes on and on and on. But what is absent from all of them is evidence of racist behavior on anybody's part

but what is certainly clear from that evidence is that race was used as a weapon and the jury may so conclude based on that record, it was used as a weapon by this defendant when he couldn't get what he wanted by legitimate means and the race issue was injected first and through out by the defendant and through the attorneys he employed to speak on his behalf. He had said in his ad that pollution was a sham, that it was an excuse, he said that all of these people were conspiring against him based on race from the League of Women Voters to Delegate Murray all the way down to Bedford Moore and he has no proof of that. He is utterly without proof. Perhaps he will put on some proof that will create a doubt in the minds of the jury but it's not here now. It was not a sham, and I asked Mr. Tucker, Mr. Tucker based on your experience what scores of development in the county, in and about the reservoir and throughout the county, was this a sham, were these people in there stopping Bedford, stopping James Fleming from his race. It said it was most definitely not a sham, it was anything but a sham. There is the suggestion that because Mr. Hurt got the Ivy Farm project approved and because Mr. Wood though he never built it because

he wasn't allowed to build it, got the Panorama approved, that this proved racism and somehow this relates to Bedford Moore. But what is clear from the record is that first of all both of those developments were quite distinct, they were zoned for what was going to be built there. They didn't have to go through the public hearing process that Evergreen went through. They were a different density than the case of Evergreen. But they were certainly differently zoned. Furthermore, although the defendant takes the position that because they were approved Mr. Moore is a racist, he freely admits he never talked to Wendell Wood. He freely admits he didn't go to all the meetings on Ivy Farm, nor did he go to all the meetings on Panorama. We know that Mr. Moore when he was challenged by Mr. Puryear before the ad was published and asked where was Bedford Moore when Panorama was considered, Bedford Moore told him at a meeting that Mr. Fleming attended and his lawyer attended. He said I was right here. Sitting right in this room tending opposition but there was a difference in the zoning. And a fine difference perhaps, but not to an experienced realtor, not to a person who has all those certificates that I asked him about and all

of that long experience. He knows that difference and he knew the difference and the jury may so conclude that he knew the difference between all of those. The only thing I suppose on which there is some question is the Ivy Farm issue in which he says well I did talk to Dr. Hurt and he did tell me that Mr. Moore didn't oppose Ivy Farm. And that's supposed to give credence to his conclusion that it was all a racist conspiracy that Bedford Moore was hatching against him. But he was impeached on that point. And his prior sworn testimony was to the effect that he had never talked to ... talked to Charlie Hurt about this development. He has also told them what is a complete phoney, a complete red herring and that's the racially restricted covenant which he testified this man was also using against him. That was one of the reasons he was convinced that it was racist. This was one of the reasons he published the ad, that's a phoney, he knows about these. He knows where they are. He knows how they're indexed and it was abundantly clear that there was nothing in any of those deeds that was to be used at any time against him. Specific reference to not reimposing any of those convenants and in point of fact he testified he

knew they were not enforceable. He was well aware of the effect of Shelly v. Kramer from 1947 which ruled that those things were by the boards, no longer enforceable. He said there were no other buffers, Mr. Tucker has testified there were certainly other buffers before this buffer. So far as the origin of the buffer is concerned that perhaps is one of the bigger problems that this defendant has. Because he alleges the buffer was a brain child, children of Mr. Moore and that it was Mr. Moore's creation. And the point of fact it was not his creation. Mr. Moore was in fact surprised to learn it was added as a condition when he attended a public meeting after the staff had made it's report and put the condition in there. And he attended that meeting, we know he attended that meeting. The Planning Staff report was read to him at that meeting in which, in great detail. Mr. Tucker read why the buffer had been proposed, where it came from and what it's purpose was. He knew that, and the jury may so conclude that he knew that. Never once did Bedford Moore utter a single thing or do a single thing that indicated racial anomalous toward this plainiff. We also know relating back to this buffer and historic landmark designation that he knew

perfectly well this historic preservation was not a sham as he alleges. And that was one of the reasons he put the ad in, because he knew it was a sham, it was really because of racist behavior, racist conspiracy. And the jury may certainly disregard all of that. Finally, The Cavalier Daily, what can the jury conclude about that? We know that this defendant was upset with The Daily Progress because it had mislead it's readers. And he said so I went to The Cavalier Daily. Now, he claims he didn't know Mr. Moore taught there but he was impeached on that. But he certainly testified he knew Mr. Moore worked at the University. And he went into The Cavalier Daily, a paper whose circulation was unknown to him by his own testimony, didn't know who read it and he put his ad in there. He put his ad in there at a very peculiar juncture in the history of the county and it's supervisors and the collection. And I think the jury may safely conclude one of the reasons why he didn't go back to create misconceptions in the minds of the readers of The Daily Progress was that he was not seeking to set the record straight. He went after a tenured professor at the University of Virginia because he knew where he lived and he could do some damage there.

He knew all about tenure. And if you read that ad straight through there is no question that the only living person named in that ad is referred to throughout the ad. I go through that, perhaps it wasn't all necessary but suffice it to say Your Honor, at this juncture there is no question but that the jury can come back on every single issue that is our burden and conclude in our favor and they may find by further conviction or belief that the leveled charges of racism and racist behavior were known to be false by this defendant or and it is in the disjunctive or were published with a reckless disregard for the truth. And therefore it would be inappropriate at this time to sustain a motion to strike. I reserve argument if we're going to have argument on whether Mr. Moore has now become a public figure in spite of the fact the Supreme Court of Virginia said he wasn't. I don't know when you want to take that up. I would suggest to the court in light of the hour and the issue that that is something that should only concern us at the time of jury instructions. It really isn't something we have to take up right now. I think we ought to limit ourselves to the other issues that relate to our burden of proof. Thank you.

THE COURT: All right, anything further Mr. Poindexter?

MR. POINDEXTER: No, no sir.

THE COURT: The Court has reviewed the evidence as we've received it carefully and taking into view the elements necessary to be proved for a plaintiff's verdict and the degrees of proof required we believe that there is sufficient evidence on each element to the degree required for the jury to be able to make a finding for the plaintiff. We consequently overrule the motion to strike. Now, I believe that's about all we can do this evening gentlemen, so we will reconvene tomorrow morning at 10:00.

MR. ALBRO: Your Honor, would I be correct in understanding then that my first order of business ...

THE COURT: Your first order of business would be to put on your evidence ...

MR. ALBRO: ... is to put on his wealth?

back if you'll remain outside and not come back into the court room until the Bailiff admits you.

JURY IN RECESS.

THE COURT: All right, has counsel had an opportunity to compare instructions yet?

MR. ALBRO: No, sir, we've got a set.

THE COURT: I'll give you about ten minutes to compare instructions and that may enable us to direct our attention to the areas of difference.

MR. POINDEXTER: Yes, sir, could we as a prerequisite could we start with a motion to strike?

THE COURT: Yes, I'll be glad to hear your motion. You may proceed with your motion.

MR. POINDEXTER: Yes, sir. Your Honor, first we have to start way up here with the libel or defamation. That can only be accomplished through an intent to use language or word that hurts someone with a knowledge that what you have said is false or you utterly disregard the facts as you know them to be or as they could be ascertained and you say so. Then in this case that certainly cannot be shown to exist. Whether what Mr. Fleming said was true or not, there

is absolutely no showing, noth.... nothing indicates, not one scintilla of evidence to show that he made a false charge given all of the circumstances as they existed then, or that he recklessly made an accusation of any kind against Mr. Moore or anybody else. Now he says, and it goes undisputed, that he was the first black person in the history of Albemarle County to undertake a development of any consequence, and there is ample testimony to show that he was turned down on two occasions and had unusual and weird, contorted restrictions and conditions imposed upon him throughout this process, and while all along around him, before and after, white property owners, white developers, were one way or another accomplishing what it was that they wanted to accomplish around the reservoir in the terms of commercial development. Now given those circumstances alone, he could conclude that I am, in his own mind, a victim of racial discrimination. I am black, I'm the only one attempting this, I'm the only that's ever attempted this, I'm the only one who is being frustrated in my attempts to develop, I have met all the conditions as I know them to exist in the county to initiate this development and they keep turning me down. Was he turned down by

people who were not suspect, were there any black people involved in this process? No. All of the persons to whom he had to go have been identified through the testimony of the witness that appeared before the court were white people with the possible exception of one Planning Commission member, who it was that Mr. Fisher couldn't even remember his name. So his involvement in all of this may, must not have been terribly effective or important. We don't even know what time frame this man served on the Albemarle County Planning Commission. Then he initiates a lawsuit in Federal Court, he makes his claim, says I am being discriminated against, I am being denied constitutional rights, due process, etc., they go to trial four days; the judge says listen, this is what we can reasonably infer, listen, what in the world has happened to this man? Give him his 2.5 unit density per acre. The Board is stampeded in front of Judge Turk, they run back, they go to a public hearing and give the man, after all these years, they give him 2.5 units per acre density. Chairman of the Board of Supervisors the next day gets up and says, ho....in fact a hollow victory, we ain't giving him nothing, we've still got a moratorium out there, he'll never develop

anything, goes in the court, volunteers to, voluntarily attempts to overturn the settlement by aiding the intervenors, has the same attorney to create the intervention process that had....representing him and his wife, Mr. Moore, from representing Mr. and Mrs. Bedford Moore on one day to representing the two intervening bodies on the next, all in an effort to stop Evergreen.

Now what could Mr. Fleming logically conclude from all this? All this increased concern about beautification of the reservior. Surely it had been of some concern in 1972, 1971, '69, for as long as Ivy Creek has drained into that man-made water shelter out there, it's been of some concern that one day because of pollution, run-off, chemical plants, of the Acme Visible Records, Morton plant, all drain right into this body of water and one day you'd have a problem. Everything came forth when Jim Fleming, black developer, announces his plans to create a subdivision out there. Everything converged. All at once a 37 year old house is designated a historical site, not only in Virginia, but on the Federal register. Overnight these things occurred within months of each other. Increased concern. There are four

studies commissioned of the reservoir within the context of this application, when this application is pending before officials here in Albemarle County. He is called a racist in 1975 by the newspaper because he raised the issue. The stage is set, racism. That's an exhibit in the case. Mr. Green from Richmond, Mr. Fleming from up here, they run around calling people racists, they're racists. All right. Mr. Fleming didn't sue the newspaper, I guess under the law that we know it to be. He could have, but it didn't even occur to him that he had a cause of action against a newspaper because it made a comment about him in the midst of a public controversy, a controversy of great interest in this community. Does he have a right to say anything in return? I mean, do we have a First Amendment or do we not? So he says, after all of this has fallen upon him, racism, I've been trying now for three or four years to effect a housing development out there, I am frustrated, these people are stopping me, they claim it's pollution, they claim it's eutrophication, they claim whatever it is, but I know what it is. I am black, I am being discriminated against; and he was vindicated four months later by the court urged settlement. He talked about things

as he perceived them. Where is the attention... where did his attention focus? It focused on the one man who was closest in his mind to all of this, the man sitting right over there. Now to rule in our favor in, on this point is not to chastise Mr. Moore, it well could be that Mr. Fleming was wrong about Mr. Moore, but that's not the issue. Did he have a right to believe that Mr. Moore was one of the....let's put it this way, ring leaders, ring leaders of this ongoing effort to deprive him of his right that he thought he had as a citizen of this country to develop property that belonged to him. Mr. Moore said in testimony, well, Mr. Fleming didn't conform to what I wanted him to conform to. He should....I was willing to dedicate my life to the public trust, Mr. Fleming was not, I thought he should have. Mr. Moore we submit has, has become by any stretch of any case that's significant, Your Honor, a public figure just as much as Mr. Fleming had become a public figure and we would concede that indeed at that time in this place he was a public figure, if not for any other reason, the paper and its attention upon him and what he was doing caused him to be a public figure.

Now does he not have a right, given the money he's spending out there, his ownership of property which he cannot do what he thinks that he has a right to do with, can he not as a free American citizen protected by our Constitution, protected by the First Amendment, protected by even something closer to us, a common law sense of privilege that a man can say something about something he owns or has a pecuniary interest or a social interest or a political interest in, can a man under those circumstances, a man can say something to people that he believes would have at least some interest in the...(inaudible). So what did he do? He said, I'm not getting a fair shake in the Progress index. Every....they've already called me racist; the reporting seems biased, I am going to an audience where I might get some attention, where I might get some sympathy. That old...the editor then, obviously he's opposed, he's not in favor of me and he goes through...we can assume that he went through his files, he pulls out the editorial where he'd been called a racist. He says, I've got to get my message through. I want to comment my way on this controversy that affects me, not only me, these are public officials making these decisions.

These are, these are tax exempt organizations, these are public...the league, League of Women's Voters, the different State agencies. I have a right to strike back, to talk back, and he does it. He goes up to the University of Virginia, he knows there's a paper up there that's widely read, probably more widely read in a certain liberal, so-called liberal segment of this community than in other parts of the community, and he addresses that community. He says, this is what's happening to me here in the shadow of Monticello; this is what's happening to my dream, just like Jefferson had a dream, he invokes Jefferson as Judge....Justice Harrison said, he compared Mr. Moore with Mr. Jefferson; Mr. Moore came out on the short end and there's nothing wrong with that. He had a right to say these things. He says this, not only does he go to the paper, The Cavalier Daily, but he also goes to the black community. He has friends in the black community; he wants to articulate to the readership of the black community at the same time what's happening to me, Jim Fleming, and he tells them. Now, Your Honor, given all those circumstances, adjust it against the fact that we have no damages. What's he going to tell the jury that all this is worth? Is

there any mention, any money been mentioned, any expert testimony as to what all...how you compute this in dollar value, what this man's embarrassment, which he may have suffered, humiliation, he may have suffered. Does that mean he's entitled to money? There are things said about all of us at different times by different people. It may have been said about Your Honor at some time or another when you turned your back on that jury decision down in Goochland. May have been all kinds of things said about you. That's unprecedented in this state. People have a right to say it. It may have hurt you, because I know, you know, the background from which you operated when you did that. But there are all kinds of things said in media and by people about other people and we get offended. Things have been said about me, Mr. Carter, Mr. Albro I'm sure, maybe even the Clerk of the Court, but that does not mean that we can use something that simply offends us or makes us feel embarrassed to cut off the right of another citizen, to speak freely about matters that affect him or her. Your Honor, there ain't nothing in this case. You know, we've been trying to tell them that since 1977, there is nothing in this case, and now that we've

heard it all, put it to rest at this point. Do what you should do as a judge, apply the law, let this man go, don't impose it upon those citizens. You know, if they'd made out a factual dispute, juxtaposition of facts of one against the other, there would be something to give to him, but it is your obligation now and you were thrust into this at a rather late date, and I would suppose that even as diligent as you are, you have not read all the law that may apply and Tom Albro and I have been working on it a long time and I'm sure we haven't read all the law that applies in this situation, but Your Honor, you should know enough about it now to do what should have been done a long time ago and dismiss this case and not leave it to those people who have no particular responsibility. There's no, there are no facts in dispute, there's nothing. Now this is framed against the fact that if you play around with the burden of proof, we find out that all this should have been, to make anything significant out of this, you got to do it not by the usual standard, preponderance, we're not even talking about that, clear and convincing. I don't know what it means to me, but I guess it means something to you as a judge, one of the cases said that it

was intermediate evidence, somewhere between proof beyond a reasonable doubt that applies in criminal cases, I never knew what that meant, and a preponderance of the evidence that applies in the usual civil case. This is a special case, special, special burden to get some money. When you start talking about infringing upon a man's right to say something, they haven't done it. And we would submit Mr. Moore, public person, man at the University, I'm just a modest little professor. Mr. Shannon comes in and says, this man is the official meeter and greeter, known all over campus, the first man that the visitors, the dignitaries at the University meet, and he greets them, makes them feel good, gets them housed and then brings them to me, he's a special man at the University. Not only that, special man out here in the community, living in a castle on the mountain, a replica of Monticello, house on the National Register of Historic Places, or about to be put on it, federal acknowledgment of the, the home, a leader in the opposition against Evergreen, the only man that we have ascertained from all of this who hired lawyers to come down and speak for him. With that, again the burden is that he must show, as he cannot, that Jim Fleming lied about him or

so disregarded his role in all of this until it was just like being a lie. And that doesn't mean make mistake about it. That simply means that Jim lied, or misconstrued everything he did to such a reckless, utter disregard for this man that it was just like a lie. Your Honor, it's just simply not here and this is the juncture to put it to rest. This is the last....could be the last litigation surrounding this mess out on the reservoir that involves this man. It should be ended today, now, should not be put to the jury, it should be taken up by you and cut off right now, because there is no case. Thank you.

THE COURT: Mr. Poindexter, in reviewing the evidence in this case, there may be evidence to sustain your characterization of the case, but as we ruled yesterday evening, we also believe that there is evidence which sustains the characterization of the case made by the plaintiff, therefore we think it is a jury question. As to the matter of damages, the Supreme Court addressed that in its decision saying that you were not limited to out-of-pocket, monetary considerations, the jury can place a value on other damages which are set out in that opinion. Consequently, we must again overrule your motion to strike.

MR. POINDEXTER: Your Honor, is that to the punitive damages? Are, are we still at that level of proof? Have they shown that after you value all the evidence, or do they just get a shot at compensatory damages?

THE COURT: Oh, if the....perhaps we can go into that in the instructions, but if they find compensatory damages, which can be damages to the man's form of embarrassment and that sort of thing, then the punitive damages can be based on those compensatory damages.

MR. POINDEXTER: But only upon a higher showing of proof. That, that's....there are two....we're right now we're faced with a, a case that rises here to....

APPENDIX E

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

October 21-22, 1982

Transcript pages 539-40

the court?

MR. ALBRO: The, the law in every jurisdiction that I'm aware of is that the determination of public figure status is made by the court and it was made by the court in this case in the first trial and I don't know of a single case anywhere that says public figure-private person status is a determination made by the jury.

THE COURT: Do you have any contrary authority, Mr. Poindexter?

MR. POINDEXTER: No, sir.

THE COURT: All right, the court concludes that it is a matter to be determined by the court. In viewing the evidence relating to Mr. Moore's conduct and his position relative to the public, we can find no evidence that establishes him to be other than a private person. The court is also persuaded that based on the language contained in the last sentence of the first full paragraph at page 892, 221 Virginia, case of Fleming versus Moore, that the only proper inference to be drawn from that sentence is that Virginia is on the negligent standard in regard to this determination.

Consequently, both instructions we feel would be proper for the jury, both as to preponderance of the evidence and the burden of proof where there is a requirement of clear and convincing evidence. It will be granted as 9 and 10 respectively.

MR. CARTER: If the court please, we want to add our exceptions to that ruling.

THE COURT: Exception noted.

MR. CARTER: To both those issues.

THE COURT: Exception noted as to each issue. All right, the next instruction, the verdict must be based on the facts as you find them and on the law contained in all these instructions. The issues on this case are: (1) Did the defendant make the statements contained in the advertisement headed "Racism" appearing in the January 15 and 16, 1976 editions of The Cavalier Daily newspaper? If he did, were they seen by someone other than the plaintiff? (3) Are the statements about the plaintiff? (4) Are the statements false? (5) Are the statements defamatory? (6) Did the plaintiff sustain an actual injury as a result of the statements? On these issues the plaintiff has the burden of proof.

(7) Are the statements substantially true? On these issues the defendant has the burden of proof. (8) If the plaintiff is entitled to recover, what is the amount of his damages? On this issue the plaintiff has the burden of proof. Your decisions on these issues must be governed by the instructions that follow. Maybe we'd better consider those instructions before....well, do you find anything objectionable about the first part?

MR. POINDEXTER: Yes, sir.

THE COURT: All right, which number do you find objectionable?

MR. POINDEXTER: There is an omission. The omission is

APPENDIX F

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff

v.

JAMES N. FLEMING,

Defendant

Law No. 976-L

October 21-22, 1982

Transcript pages 527-39

tions of the court.

MR. POINDEXTER: Forgive me, Your Honor. I don't believe that there was any matter stricken by the, by the court from the evidence.

THE COURT: Yes, there....the court did strike....

MR. POPE: I recall one, Your Honor.

THE COURT: ....did strike some matter from consideration of the jury today.

MR. POINDEXTER: I, I always think in terms of exhibits or something, but I guess it was something....

MR. CARTER: The court pleases, you read that as you must not base your verdict on any, in any way upon something....

THE COURT: Sympathy, bias, guesswork or speculation.

MR. CARTER: Sympathy, okay. All right.

THE COURT: I shortened it a little bit just because I thought all counsel were familiar with the language. Granted as 8. I will read it in its entirety when the jury is here.

MR. POINDEXTER: Okay.

THE COURT: When a party has the burden of proof on an issue by the greater weight of all the evidence, this is sometimes called proof by the preponderance of the evidence. It is that testimony which you find more convincing. The testimony of one witness whom you believe can be the greater weight of the evidence. Any objection to that?

MR. POINDEXTER: We'll object to that one, Your Honor.

THE COURT: Well, that is, that instruction is correct. Your only objection is whether or not it is....whether we're talking about a preponderance of the evidence in this case, isn't that correct?

MR. CARTER: Yes, sir.

THE COURT: Perhaps we should put that aside then for the moment. When a party has the burden of proving an issue by clear and convincing evidence, he must produce evidence that creates in your minds a firm belief or conviction that he has proven the issue. That's the other side of the coin. We'll put that aside.

MR. ALBRO: I don't think there's any dispute about that.

THE COURT: No dispute about that one?

MR. CARTER: No dispute....

MR. ALBRO: We all agree that punitive damages have to be shown by clear and convincing evidence.

THE COURT: That will be granted. Maybe we ought to go ahead and make this determination at this point so we can keep these instructions together.

MR. ALBRO: All right.

MR. POPE: That's a good idea.

THE COURT: All right, I'll be glad to hear counsel on the burden of proof. Since it's your instruction, Mr. Albro, we'll let you lead off.

MR. ALBRO: Your Honor, the issue relates to compensatory and punitive damages. There is no issue at all with respect to punitive, the Supreme Court made that very clear. We can only recover them if compensatory damages are awarded. if the jury believes that we have shown by clear and convincing evidence in the instruction just read, that the charges that were false and defamatory were published as knowledge and for a reckless disregard for the truth. The preponderance issue is as to compensatory damage and there

is no requirement that the insult, embarrassment, and humiliation for example, which the Supreme Court says is compensable in this case, has to be proved by clear and convincing evidence, or that there need be any evidence of either the knowledge of falsity, or the reckless disregard for the truth on the part of the defendant, rather the issue is one of negligence, and if we should prove by a preponderance of the evidence that the defendant was merely negligent in making the false and defamatory charges, then we are entitled to recover compensatory damages, and that is as distinguished from the knowledge of false and reckless disregard for the truth standard of punitive damages. Now the, since we have a private individual who has been defamed by a non-media defendant, the standard for recovery of compensatory damages in Virginia would be negligence and of course that's a preponderance test. The decision of Gertz versus Robert Welsh, left to the states the standard by which compensatory damages would be awarded in a case of a private plaintiff. Now, the Supereme Court of Virginia has not ruled definitively on what standard it would follow in the case of a private plaintiff seeking compensatory damages in a libel suit. They have alluded to

the fact that they are going to have to make a decision some day in Burke Newspaper Publishing Corporation, but they didn't enunciate the standard. However, two cases in Virginia have addressed this and have ruled and they are Mills versus Kingsport Times News, which is 475 Federal Supplement, 1005, that's a Western District of Virginia case decided by Judge Williams in 1975. And then General Products Company, Inc., versus Meredith Corporation, 526 Federal Supplement 546; that's an Eastern District of Virginia case, decided by Judge Merhige in 1981. In both of those cases the courts ruled in Erie Educated Guess situations that if the Virginia Supreme Court were called on to set the standard by which a private plaintiff recovers compensatory libel damages, it would be negligence. That is the overwhelming majority rule in the states that have since Gertz enunciated the standard by which the private plaintiff recovers. And in Mills, Judge Williams said, it is the opinion of this court that the Virginia policy of accurately reporting public records is better served by a standard of negligence rather than actual malice. He went on to say the same, his decision is of no validity in Virginia and private individual defamation suits may recover on proof of

negligence. So we have in our instructions, tendered the rule that has been enunciated in the only cases in Virginia to treat the issue since Gertz, other than being deversity cases that came up in Federal Court, and the rules enunciated by Judges Williams and Merhige comports with the, as I say, overwhelming majority rule in the states that have taken it up, so in this case we take the position that since we have a private plaintiff, he is entitled to recover for compensatory damages if he shows that the false and defamatory statements made by the defendant were made negligibly and the burden of proof on the negligence issue is the preponderance of the evidence and our instructions so state. There is no dispute that on the question of punitive damages after the opinion in this case handed down by the Supreme Court, the burden of proof is not preponderance but clear and convincing and we have so tendered that instruction and that we must show not negligence but either knowledge of falsity or reckless disregard for the truth, and we have instructions that are precisely tailored to those two different rules of law. I might add, since I know this is an abiding concern of the defense, that there is really no basis at all for now converting the man the

Virginia Supreme Court said was a private person into a public figure, and the only way that you could justify an instruction on compensatory damages would require clear and convincing evidence of knowledge of falsity or reckless disregard for the truth, where if that person were a public figure rather than a private person and the essential elements of evidence that went into the Supreme Court's ruling in 1981, that he is a private person, haven't changed in this case. There is a great deal more evidence of the particulars of the controversy and of necessity that was introduced to show a basis for stating that it was published with reckless disregard for the truth because the truth is contained in the public record, but while the evidence is certainly far more substantial and of a somewhat different nature on that side of the question, on the public versus private individual question, it hasn't changed and I will be prepared if the court wishes to indulge that kind of argument further to cite the appropriate case law that has been handed down in the Federal courts on what makes a person a public figure versus a private figure.

THE COURT: All right, Mr. Poindexter, is your argument in favor of the higher standard of proof based on

your position that Mr. Moore is a public figure, is that your, is that your position?

MR. POINDEXTER: No, sir. No, sir, it's based only in part on that position. First of all, the decision by Judge Williams, 475 Fed. Sup., 1975, I guess can be disregarded for purposes of this argument, since the Supreme Court of Virginia commented again in the Fleming case on, on March 6, 1981. I'd like to know from counsel when Judge Merhige's opinion was authored, and whether he refers to the pronouncement of the Supreme Court in the Fleming case, whether he was guided by that.

MR. ALBRO: The Merhige decision was handed down, my recollection is, and it's just my recollection, was handed down in September of 1981, and I don't believe it referred to the Fleming case at all. The curious thing about Judge Williams' decision is that it was very....

MR. POINDEXTER: Would you....you have interrupted my argument. I just wanted you to give me some information....

MR. ALBRO: No, you asked me to point something out.

MR. POINDEXTER: ....and now you don't need to tell us anything curious about Judge Williams' opinion.

MR. ALBRO: The interesting thing....

THE COURT: Yes, well I...the court would like to hear it and this is for the court's benefit, it's not a question of the, of the jury.

MR. ALBRO: The....we're all familiar with the Erie educated guess problem that the Federal judges are confronted with and as we know in the, in the defendant opinion in this case, the Supreme Court modified the rule about special damages and they said special damages are not limited to out-of-pocket loss. You may get to the jury if you show insult, embarrassment, mortification, that's special damage too, we hereby modify the rule. Many of us who follow the development of libel law in Virginia were a little taken aback when Judge Williams said that in 1975. In fact we thought he was dead wrong, we wondered who his clerk was, how they could possibly say that because the Virginia Supreme Court had always said it was out-of-pocket loss and nothing more, but he said no, I don't take that position, it's my judgment that the rule is that humiliation by itself could be special

damage to get you to the jury if it wasn't libelous per se. Well he was right, and that's exactly what they did and I suggest to you that both he and Judge Merhige are correct too, that in the proper case when it has to address this issue, the Virginia Supreme Court will adhere to a negligence standard when a private plaintiff seeks compensatory damages.

THE COURT: All right, if you'll continue your argument now, Mr. Poindexter.

MR. POINDEXTER: Can you tell us when Judge Merhige authored his opinion?

MR. ALBRO: I've told you the best....

MR. POINDEXTER: Do you have it? Do you have....

MR. ALBRO: You want....would you like me to answer? I told you my best recollection is September of 1981, but I can't...

MR. POINDEXTER: Do you have it with you today?

MR. ALBRO: I don't have a copy of it with me.

MR. POINDEXTER: Okay. Now does it refer to the Fleming case, Moore versus Fleming?

MR. ALBRO: My recollection is that it doesn't discuss it.

MR. POINDEXTER: Okay. So that means whatever he said, he did not say it against the backdrop of having....

MR. ALBRO: No, sir.

MR. POINDEXTER: ....the wisdom of the Virginia Supreme Court in the Fleming versus Moore case...

MR. ALBRO: He addressed....

MR. POINDEXTER: ....if it's not referred to.

MR. ALBRO: He addressed an issue that the Supreme Court of Virginia didn't address in Fleming versus Moore, which is the standard by which a private plaintiff recovers compensatory damage.

MR. POINDEXTER: The very interesting thing about Fleming versus Moore, and it is significant, is probably the significant case, Your Honor, is that to Mr. Carter and myself, the Virginia Supreme Court has it both ways; it goes beyond what the Supreme Court of the United States has done in terms of punitive damages, because it goes beyond Gertz and makes a definitive finding that non-media defendants can

only have judgment rested against them upon...for punitive damage upon clear and...showing clear, clear and convincing evidence. Now that is beyond what the Supreme Court of the United States has done, so if we should anticipate....

THE COURT: Counsel are in agreement on that.

MR. POINDEXTER: ....if there's an unanswered question as to what the Supreme Court of Virginia will do when the question is directly framed, we would have to suppose that they would not, it would not fall back upon an archaic standard of negligence in a, what has to be seen now as a constitutional free speech situation. No matter who we talk about or who we are, we are still protected by the First Amendment to the Constitution of the United States, and that gives us a right to say certain things and you can't offend that protection or strip yourself of it by being negligent. I mean just, and these instructions offend me because throughout Mr. Albro uses simple negligent standard and that standard, we submit, no longer exists in Virginia, and indeed, there must be shown malice of some kind to get any kind of judgment for compensatory damages....

THE COURT: Well what is your authority for that?

MR. POINDEXTER: Pardon?

THE COURT: What is your author....I understand about punitive damages, but what is your authority that Virginia requires that standard in compensatory damages?

MR. POINDEXTER: It's a, a construction of the....it's really a construction of the Fleming, the implications of the, the decision in the Fleming case.

THE COURT: You want to point out any specific language in the Fleming case that you think is indicative of that?

MR. POINDEXTER: Forgive me, Your Honor, I've been fumbling looking for the opinion, we have it here in the folder.

MR. ALBRO: Your Honor, could I bring one sentence to your attention....

THE COURT: Sir?

MR. ALBRO: ....that may answer this problem? This is at page 892 of the Fleming versus Moore opinion. Maybe they've told us, I don't know. In their conclusion about the public figure, private person distinction, it states, since Moore's involvement at the public hearings was in his

capacity as an adjoining private landowner whose property might be affected by the proposed development, we conclude that he was not a public figure, therefore, he was not required to show as a prerequisite to recovery of compensatory damages that Fleming acted with malice that met the New York times and standards. I think that ends it.

THE COURT: This is not with malice, doesn't say it's necessary with negligence but that's really the only reasonable alternative, isn't it?

MR. ALBRO: Well, and I might point out that Mr., Mr. Poindexter refers to negligence as the archiac standard. I might correct him on that. The archaic standard was that no culpability need be proved by the plaintiff. If he could prove that it was false and defamatory, malice was presumed. We didn't have to show anything at all. The lesson of the cases that have come down since Gertz is that presumed damages cannot now be awarded, there must be some level of culpability, and as Judges Merhige and Williams tell us, and the majority of State Supreme Courts have told us, that level of culpability where a private plaintiff seeks compensatory damage is negligence.

THE COURT: All right, Mr. Poindexter, do you want to point out anything or comment on what Mr. Albro has said?

MR. POINDEXTER: Your Honor, you don't fall, fall away from actual malice to simple negligence. There is gross and wanton conduct which again, is one of those intermediate standards and the second thing that has been overlooked in all of this and, is that the issue of whether or not, and Mr. Albro keeps bringing this up as if this position has been foreclosed by this opinion, the issue of not....as to whether or not Mr. Moore was a, is or is not a public figure was never litigated before the trial court except as an afterthought by Charles Carter and myself upon post verdict attempts to try to have the judgment set aside and the....therefore the question of whether or not he was a public figure was put before the Virginia Supreme Court upon a, the most meager rec....so I would hope that Your Honor has not taken a position as to, as to that. There is an open question whether this is a factual determination to be made by the jury or whether this is a question of law to be resolved by the court, and Mr. Albro has...I mean that the...that

is up to Your Honor to, to decide, whether indeed it's a factual question or one of law. But given the resort of Virginia Supreme Court to a standard of proof greater than Gertz, it is logical to assume that they would not in the same case reaffirm or establish a negligence standard, simple negligence standard in libel cases.

THE COURT: All right, Mr. Albro, do you wish to address yourself as to whether or not the determination of whether Mr. Moore is a public figure or a private person for purposes of this case is a matter to go to the jury or to be determined by the Court?

MR. ALBRO: The, the law in every jurisdiction that I'm aware of is that the determination of public figure status is made by the court and it was made by the court in this case in the first trial and I don't know of a single case anywhere that says public figure-private person status is a determination made by the jury.

THE COURT: Do you have any contrary authority, Mr. Poindexter?

MR. POINDEXTER: No, sir.

THE COURT: All right, the court concludes that it is a matter to be determined by the court. In viewing the evidence relating to Mr. Moore's conduct and his position relative to the public, we can find no evidence that establishes him to be other than a private person. The court is also persuaded that based on the language contained in the last sentence of the first full paragraph at page 892, 221 Virginia, case of Fleming versus Moore, that the only proper inference to be drawn from that sentence is that Virginia is on the negligent standard in regard to this determination. Consequently, both instructions we feel would be proper for the jury, both as to preponderance of the evidence and the burden of proof where there is a requirement of clear and convincing evidence. It will be granted as 9 and 10 respectively.

MR. CARTER: If the court please, we want to add our exceptions to that ruling.

APPENDIX G

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff

v.

JAMES N. FLEMING,

Defendant

Law No. 976-L

October 21-22, 1982

Transcript page 608

MRS. HIRSCH: It is.

THE COURT: The verdict is in proper form. "We, the jury, upon the law and evidence find our verdict for the plaintiff, W. Bedford, III against the defendant and award him compensatory damages in the amount of one hundred thousand dollars ($100,000.00) and punitive damages in the amount of two hundred and fifty thousand dollars ($250,000.00), together with interest on the amount of two hundred and fifty thousand dollars ($250,000.00) at the rate of twelve (12) percent per year from January 16, 1976. Signed foreman." Is this your verdict ladies and gentlemen of the jury, so say you all?

(All jurors indicated in the affirmative)

THE COURT: Is there any motion that the jury be polled?

MR. CARTER: Yes, Your Honor.

THE COURT: All right, poll the jury. If this is your verdict as read by the court, you will answer yes.

(Jury polled at this time and all jurors indicated yes)

THE COURT: The polling indicates the verdict is the verdict of the jury. Ladies and gentlemen of the jury, the court thanks you for your participation in this case. We realize it has been a long and arduous experience for you but

APPENDIX H

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

April 21, 1983

April 21, 1983

Mr. Thomas E. Albro
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Mr. Gerald G. Poindexter
Poindexter & Poindexter
Attorneys at Law
P. O. Box 766
Surry, Virginia 23883

Re: W. Bedford Moore, III
v.
James N. Fleming

Gentlemen:

The Court again takes the opportunity to thank counsel for their careful briefing and thoughtful arguments in this case.

A careful review of the Court's rulings on motions made and objections taken in the light of the arguments raised in your respective briefs leads us to the conclusion that the Court's rulings were proper. Our review of the Court's rulings on instructions finds those rulings proper, and further that the jury was properly instructed.

On the question as to whether or not the evidence supports the jury verdict, we conclude that it does. Evidence of damages as the Supreme Court has stated in the first trial of Moore v. Fleming should not necessarily be restricted to out-of-pocket loss. "...Moore is entitled to recover

compensatory damages upon proof of actual injury including such elements as damage to his reputation and standing in the community, embarrassment, humiliation, and mental suffering." We find that there is ample evidence of the elements of actual injury, when so defined.

In giving consideration to the implications of the size of the verdict and specifically whether or not remittitur should be allowed under the circumstances, we must consider whether or not the jury was laboring under a misconception of the law, or the evidence or whether there was some other error or mistake, or if the jury was motivated by prejudice or sympathy. In effect, we must consider whether or not the jury verdict was based on the evidence. Viewing the evidence in the light most favorable to the jury verdict, we have evidence of deliberate and highly inflammatory false statements interjected deliberately into a highly sensitive academic community where such charges were extremely damaging. Under all the circumstances as revealed by the evidence we cannot say that the jury verdict is unsupported.

We deny the motion to set aside the jury verdict and to grant a new trial. The jury is the conscience of the community. Apparently this was a jury that felt strongly about the curse of racism and wished to make a strong statement about the unjustified use of the epithet of racism.

We conclude that the Court should enter judgment on the verdict in the full amount of the award including the prescribed interest. We ask that Mr. Albro prepare the Order and circulate it for endorsement by counsel of record, before presentation to the Court.

Sincerely,

/s/F. W. Harkrader, Jr., Judge
F. W. Harkrader, Jr., Judge

FWHjr/bl

cc: Shelby Marshall, Clerk

APPENDIX I

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

June 3, 1983

V I R G I N I A :

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

W. BEDFORD MOORE, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**AT LAW NO. 976-L**
	)	
JAMES N. FLEMING,	)	
	)	
Defendant.	)	

FINAL JUDGMENT ORDER

On October 21, 1982 came the parties, in person and by counsel, and also a civil panel pursuant to a venire facias heretofore issued. The venire was duly sworn and examined by the Court. One member of the venire was excused for cause by the Court and replaced by one additional member who was duly sworn and examined. Counsel for the Plaintiff and counsel for the Defendant each alternately struck three members from the panel, leaving seven veniremen. Defendant moved to dismiss the venire so constituted on the grounds that plaintiff struck the only two blacks on the venire

and that no blacks remained in the venire after such strikes, which motion was overruled by the Court.

After the opening statements of counsel and the presentation of Plaintiff's evidence, counsel for Defendant moved to strike the Plaintiff's evidence, which motion was argued by counsel, duly considered by the Court and overruled, to which ruling the Defendant objected and noted his exceptions. The Defendant then introduced his evidence and rested. Plaintiff introduced evidence in rebuttal and rested, whereupon Defendant renewed his motion to strike Plaintiff's evidence, which motion was overruled by the Court.

Whereupon, the Court received proposed instructions from counsel for Plaintiff and counsel and Defendant, granted some, amended some, and refused some. Counsel for the parties noted their exceptions and objections regarding the instructions. Thereupon, the Court instructed the jury and counsel made their closing arguments.

The jury retired from the courtroom to consider its verdict.

After due deliberation, the jury returned to the courtroom with the following written verdict:

> We, the jury, upon the law and the evidence, find our verdict for the plaintiff, W. Bedford Moore, III, against the defendant and award him compensatory damages in the amount of $100,000.00 and punitive damages in the amount of $250,000.00, together with interest on the amount of $250,000.00 at the rate of 12% per year from January 16, 1976.
>
> Mimi E. Hirsch, Foreman.

Whereupon, the Defendant orally moved the Court to set aside the verdict of the jury as contrary to the law and the evidence and enter judgment for the Defendant, which motion the Court denied with leave for Defendant to file a written motion to set aside the verdict or in the alternative for a new trial. Defendant thereafter filed a written Motion To Set Aside Verdict And Enter Judgment for Fleming Or, In the Alternative, For A New Trial together with supporting memoranda. Defendant, in turn, filed a Memorandum In Opposition To Motion To Set Aside Verdict For A New Trial. By letter dated February 25, 1983 the Court requested argument ore tenus from counsel for the parties limited to the question of whether the Court should order remittitur. After

consideration, the Court denied Defendant's written post-trial Motion to which action of the court the Defendant objects. The opinion of the Court is found in a letter to counsel dated April 21, 1983 which is made a part of the record.

It is ADJUDGED, ORDERED and DECREED that the Plaintiff have judgment against the Defendant, James N. Fleming, in accordance with the aforesaid verdict of the jury in the sum of Three Hundred Fifty Thousand Dollars ($350,000.00) and costs, and interest at the rate of twelve (12) percent per annum on the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) from January 16, 1976.

It is FURTHER ADJUDGED, ORDERED AND DECREED that, pursuant to Rule 5:9, Rules of the Supreme Court of Virginia, the transcript of hearings ore tenus held on January 29, 1982. October 7, 1982 and March 28, 1983, and the transcript of the trial held on October 21 and 22, 1982, be and the same are hereby made part of the record in this case.

Defendant having indicated his intention to appeal this order to the Supreme Court and having moved the Court to suspend execution of the judgment entered herein, the

Court hereby ORDERS that execution of this judgment is suspended so long as Defendant timely prosecutes the appeal and thereafter so long as the matter is under consideration by the Supreme Court, provided however that Defendant or someone for him shall fine an appeal bond in the Office of the Clerk of this Court within thirty (30) days of the entry of this order, with surety approved by the Judge of this Court, in the penalty of two hundred fifty thousand Dollars ($250,000.00) reciting this judgment, and Defendant's intention to present a petition for appeal and the other conditions set forth in Section 8.01-676(A) of the Code of Virginia (1950), as amended.

ENTER:/s/F. W. Harkrader, Jr.

DATE: 6/3/83

I ask for this:

/s/Thomas E. Albro
Thomas E. Albro
Barrett E. Pope
Smith, Taggart, Gibson & Albro
105-109 E. High Street
Charlottesville, VA 22901

Counsel for plaintiff

See and objected to:

/s/L. B. Cann, III

D. Alan Rudlin
L. B. Cann, III
Hunton & Williams
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Richmond, VA 23219

Gerald G. Poindexter
P. O. Box 766
Surry, VA 23883
Counsel for defendant

APPENDIX J

SUPREME COURT OF VIRGINIA

JAMES N. FLEMING,

Appellant,

against

W. BEDFORD MOORE, III,

Appellee.

Record No. 831446

June 7, 1984

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 7th day of June, 1984

James N. Fleming, **Appellant,**

against **Record No. 831446**
Circuit Court No. 976-L

W. Bedford Moore, III, **Appellee.**

From the Circuit Court of Albemarle County

Upon the petition of James N. Fleming an appeal is awarded him from a judgment rendered by the Circuit Court of Albemarle County on the 3rd day of June, 1983, in a certain proceeding then therein depending, wherein W. Bedford Moore, III, was plaintiff and the petitioner was defendant.

And it appearing that an appeal bond in the penalty of $250,000, conditioned according to law, has heretofore been given in accordance with the provisions of section 8.01-676 of the Code, additional bond is required in the amount of $460,000.

This appeal, however, is limited to the consideration of assignments of error D, E, G and H which read as follows:

D The jury's award is so excessive that it indicates the jury was influenced by passion, prejudice or corruption, or misconceived or misconstrued the law or facts.

E The jury's award of prejudgment interest at the rate of 12% per annum is contrary to law because prejudgment interest is not allowable on punitive damages and, further, because 12% exceeds the maximum allowable rate of prejudgment interest.

G The trial court erred in refusing to instruct the jury that, in order to find Fleming liable for compensatory damages, it must find that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

H The trial court erred in refusing to strike plaintiff's evidence on punitive damages because there was insufficent evidence on which the jury could conclude that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignments of error No. D, E, G and H, and the briefs to be filed shall be limited to such discussion as is relevant to the assignments of error upon which this appeal is awarded.

The petition for appeal is refused as to the remaining assignments of error.

A Copy,

Teste: /s/ Allen L. Lucy

Clerk

Supreme Court of Virginia

James N. Fleming, **Appellant,**

against **Record No. 831446**

Circuit Court No. 976-L

W. Bedford Moore, III, **Appellee.**

From the Circuit Court of Albemarle County

CERTIFICATE

Pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia, I, Allen L. Lucy, Clerk of the said Court, do hereby certify that on June 7, 1984, an appeal was awarded from a judgment rendered by the court below on June 3, 1983, in the suit therein depending under the short style of **W. Bedford Moore, III v. James N. Fleming.**

Additional bond is required in the penalty of $460,000 in conformity with Code § 8.01-676.

This certificate, constituting the summons on appeal, was this day mailed to the court below and to

D. Alan Rudlin, P.O. Box 1535, Richmond, Virginia 23212

L. B. Cann, III, P.O, Box 1535, Richmond, Virginia 23212

W. Jeffery Edward, P.O. Box 1535, Richmond, Virginia 23212

Gerald G. Poindexter, P.O. Box 766, Surry, Virginia 23883

Counsel for Appellant

Thomas E. Albro, 105-109 East High Street, P.O. Box 1585, Charlottesville, Virginia 22902

Barrett E. Pope, 105-109 East High Street, P.O. Box 1585, Charlottesville, Virginia 22902

Counsel for Appellee

Given under my hand this 8th day of June, 1984.

/s/Allen L. Lucy
Clerk

APPENDIX K

(Paid Advertisement)

RACISM

I have endeavored to realize the opportunity to provide housing and pleasant surroundings for working people — the sort of people who made this this the great country that it is.

I do not expect any Farmington members to buy my houses. The tenured position-holders who live off the public dole at the expense of the working people are already well-housed, and could not be expected to live in a racially-integrated neighborhood, anyhow.

There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monticello upon the hill-top overlooking the developing community we have a replica of Monticello upon the hill over-looking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little Monticello does not want any black people within his sight.

There is a great conflict waging between the haves and the have-nots. Obviously we have created too much financial security for the tenured segment of the economic community whose greed is repeatedly shown by their expression of "I've got mine — too bad about you".

I am a lover of liberty and freedom of opportunity. I cannot stand by and see the have-nots oppressed by the no-growth people who are living off of our work. I know that this Country did not achieve the highest living standard in the world by no-growth or by oppression of the working man, and yet today the opportunity to improve one's living standard is being violently opposed by the same people who oppose my proposed neighborhood.

Pollution of the reservoir is being used as the current excuse to foster no-growth. The solution, of course, is to remove the guaranteed incomes of these greedy people and put them in the position of seeing the world through the eyes of one seeking the opportunity to improve his or her living standard. Only then would they admit that the pollution excuse is a sham.

I will develop Evergreen, and a lot of people will benefit from it.

Signed: **JAMES N. FLEMING**

AFFIDAVIT OF SERVICE

STATE OF VIRGINIA)
) To-wit:
CITY OF RICHMOND)

D. Alan Rudlin, being first duly sworn, hereby states that on this 5th day of September, 1984, he served counsel for Respondent with three (3) copies of the foregoing **Petition For Writ of Certiorari** by mailing the same, first-class postage prepaid, to counsel for Respondent at the following address:

Thomas E. Albro
Taggart, Gibson and Albro
P.O. Box 1585
Charlottesville, Virginia 22902

All parties required to be served have been served.

D. Alan Rudlin

Subscribed and sworn to before me this 5th day of September, 1984.

My commission expires: August 7, 1987.

FILED
OCT 3 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-382

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1984

JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE, III

Respondent

On Writ of Certiorari
to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas E. Albro

SMITH, TAGGART, GIBSON & ALBRO
105-109 East High Street
Post Office Box 1585
Charlottesville, Virginia 22901
Telephone: (804) 977-4455

Counsel for the Respondent

BEST AVAILABLE COPY

55pp

QUESTIONS PRESENTED FOR REVIEW

I. Should certiorari be granted when the Supreme Court of Virginia presently has Petitioner's appeal under consideration and may rule in his favor on non-federal grounds and when Petitioner is also presently seeking to dismiss Respondent's cause of action on First Amendment grounds in a United States District Court?

II. Does a private homeowner who appears at zoning hearings on a proposed housing project next to his home lose his status as a "private individual" under the First Amendment?

III. Are false accusations by Petitioner of racist belief and racist behavior on the part of the Respondent entitled to the protection of an absolute privilege under the First Amendment?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Authorities iv

Opinions Below 1

Statement of Jurisdictional Grounds 1

Constitutional and Statutory Provisions Involved 7

Statement of Case 7

Argument 15

I. **MOORE WAS A PRIVATE INDIVIDUAL THROUGHOUT THE EVERGREEN CONTROVERSY AND DID NOT LOSE THE FIRST AMENDMENT PROTECTIONS ACCORDED PERSONS IN THAT STATUS** 15

II. **FLEMING'S FACTUAL ASSERTION THAT MOORE HELD RACIST BELIEFS AND ENGAGED IN RACIALLY DISCRIMINATORY BEHAVIOR IS NOT ENTITLED TO CONSTITUTIONAL PROTECTION** 19

Page

III. FLEMING'S ATTACKS WERE FALSE STATEMENTS OF FACT, NOT OPINIONS 21

Conclusion 26

Appendices.....A-1
B-1

TABLE OF AUTHORITIES

CASES: **Page**

UNITED STATES SUPREME COURT:

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 2-7

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 18, 19, 22

Gospel Army v. Los Angeles,
331 U.S. 543 (1947) 3

Hutchinson v. Proxmire,
443 U.S. 111 (1979) 18, 19

Local #438 v. Curry,
371 U.S. 542 (1963) 5

Mills v. Alabama, 384 U.S. 214 (1971) 4

New York Times v. Sullivan,
376 U.S. 254 (1964) 20

Organization for a Better Austin v. Keef,
402 U.S. 415 (1971) 5

Pope v. Atlantic Coastline Railroad,
345 U.S. 379 (1953) 5

Ritchfield Oil Corp. v. State Board of
Equalization, 329 U.S. 69 (1946) 5

Time, Inc. v. Firestone, 424 U.S. 448
(1976) 17

Wolston v. Readers Digest Association,
Inc., 413 U.S. 157 (1971) 18

Page

LOWER COURTS:

Alabama v. Mills, 278 Ala. 188, 176 S.2d 844 (1965) 4

Harris v. Tomczak, 94 F.R.D. 687 (E.D.Cal. 1983) 18

Hotchner v. Castillo-Puche, 551 F.2d 910, (2d Cir. 1977) 24, 25

Ollman v. Evans, 713 F.2d 838 (D.C. Cir. 1983) 23, 24

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const. Amend. I 15, 24

U.S. Const. Art. I, §10 5

28 U.S.C. §1257(3) (1982) 2

No. 84-382

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1984

JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE, III

Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Respondent, W. Bedford Moore, III (Moore) respectfully prays that the petition for writ of certiorari of Petitioner, James N. Fleming (Fleming) be denied on the grounds that the issues raised in his petition are neither timely nor ripe for decision and the petition raises issues which are neither novel nor important for decision by this Court.

OPINIONS BELOW

Moore adopts Fleming's statement of the opinions below and his references to the trial transcript, trial exhibits and appendicies to the briefs filed in this Court.

STATEMENT OF JURISDICTIONAL GROUNDS

Petitioner has improperly invoked the Court's certiorari

jurisdiction under 28 U.S.C §1257(3) (1982) because he does not appeal from a "final" judgment below either in the traditional sense or as expanded by exceptions set forth in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477, 479 (1975). Fleming relies exclusively on the first test of Cox—the practical finality test—and asserts that since the Supreme Court of Virginia has denied an appeal on his federal grounds, the judgment of the trial court is final as to the federal questions, thus ending the case for all practical purposes. However, this case is now pending in the Virginia Supreme Court, and reversal of the trial court judgment and entry of final judgment in petitioner's favor is possible. Fleming has also asked the United States District Court for the Western District of Virginia to enjoin Moore from prosecuting any action for libel in this case (App. A). Fleming's complaint was filed August 9, 1984 and relies upon First Amendment grounds. A hearing on Moore's motions to dismiss and to stay proceedings in that case have been scheduled for November 30, 1984.

In Cox the decision of the Georgia Supreme Court finding a Georgia statute prohibiting the public disclosure of names of rape victims to be a legitimate limitation

of freedom of the press was held to be a final decision for the purposes of review in this Court, even though the decision resulted in further state court proceedings. Because either a reversal or a refusal of intermediate review of the state court decision would terminate the litigation, and because a refusal to review the state court decision immediately might "seriously erode federal policy," 420 U.S. at 483, the Court held it had jurisdiction to review the state court decision. The factors most significant to the Court were that the interests of judicial administration could be served by a reversal of the state court decision, and a refusal to pass on the constitutionality of the statute would leave the press in Georgia faced with a law of questionable constitutionality. Id. at 486. Thus, there was a substantial unresolved federal question involved in the action.

This Court has indicated the test of a final judgment is a pragmatic, not a formal one. Id. at 486. The test is whether the decision terminates "the litigation by fully determining the rights of the parties so that nothing remains to be done...except the ministerial act of rendering the judgment which the appellate court...directed." Gospel

Army v. Los Angeles, 331 U.S. 543, 546 (1947).

Fleming relies on the first judicial exception to the final judgment rule expressed in Cox at pages 477 and 479. This exception may exist when further litigation will take place in state court, but the federal issue is conclusive and the appellee, upon remand, is certain to succeed. 420 U.S. at 479. Conclusiveness of the federal issue has been construed very narrowly. Id. at 479. One of the cases cited in Cox is Mills v. Alabama, 384 U.S. 214 (1966), which involved a statute that imposed a substantial restraint on the First Amendment freedom of the press. The Alabama Supreme Court upheld a law that made it a criminal offense for any newspaper to publish an editorial on election day urging voters to elect particular candidates. Mills, the editor of the Birmingham Herald, published an editorial on election day urging the adoption of a mayor-council form of government. During his prosecution, Mills challenged the Alabama Corrupt Practices Act as unconstitutional on its face and as applied. After a trial court sustained his demurrer, the Supreme Court of Alabama reversed and remanded, holding the law valid. Alabama v. Mills, 278 Ala. 188, 195-96, 176 So.2d 844, 890 (1965). Other

cases cited in Cox involved an injunction against leaflet distribution by a private group; [1] a state court injunction against labor picketing where the court arguably had no jurisdiction to issue the decree;[2] a state court injunction against a claim brought under the Federal Employers' Liability Act by an injured employee;[3] and a sales tax measure levied upon an export.[4] In all these cases, the petitioners would have had no defense on remand and there were no significant factual issues remaining for decision.

Although a literal reading of the first exception to the final judgment rule in Cox appears to allow review of decisions where significant factual issues remain, in

---

[1]Organization for a Better Austin v. Keef, 402 U.S. 415 (1971). (Although this case reviews a non-final determination, its careful qualifications avoid opening additional pathways to appeals of non-final judgments. This case actually reviews a "de facto permanent injunction" which is only labeled as temporary and non-final.)

[2]Local #438 v. Curry, 371 U.S. 542 (1963). (The National Labor Relations Board arguably had exclusive jurisdiction over the case.)

[3]Pope v. Atlantic Coastline Railroad, 345 U.S. 379 (1953). (The Court explicitly found there was no defense at trial and that there was "nothing left to be decided." Id. at 382.)

[4]Richfield Oil Corp. v. State Board of Equalization, U.S. 69 (1946). (The tax violated U.S. Const. art. I, §10, cl.2, which prohibits state taxation of exports.)

practice this Court has required that the federal question be presented without significant unresolved factual issues. Since the discussion of this category in Cox is dictum, a petition brought under this exception should encounter a restrictive interpretation of "conclusive." A petitioner must assert grounds conclusive of the action; Fleming fails to do so. The lawsuit must be "concluded" in practical terms; this case has yet to be argued before the Supreme Court of Virginia.

This case has not been concluded. Unlike Cox, Fleming petitions this Court for review in advance of the Virginia Supreme Court's decision on the merits of his state court appeal. The Virginia Supreme Court will be ruling on the following assignments of error: (A) The trial court erred in refusing to instruct the jury that in order to award compensatory damages, it must find Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true; (B) the trial court erred in refusing to strike Moore's evidence on punitive damages because there was insufficient evidence on which the jury could conclude that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true; (C) the jury's award is so excessive that it indicates the jury

was influenced by passion, prejudice, or corruption, or misconceived or misconstrued the law or facts; (D) the jury's award of prejudgment interest at the rate of 12% per year is contrary to the law because prejudgment interest is not allowable on punitive damages and, further, because 12% exceeds the maximum allowable rate of prejudgment interest.

The Virginia court's decision regarding assignment of error (C) could result in reversal of the trial court and entry of final judgment for Fleming. Clearly, Fleming's petition for certiorari does not warrant application of the first exception to the final judgment rule in Cox. The petition precedes state court argument and rulings on assignments of error; there is no substantial unresolved federal question presented in the petition for the Court's consideration, and should the Supreme Court of Virginia remand for a new trial, there is no evidence that the appellee is certain to succeed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Moore adopts Fleming's statement of these provisions.

STATEMENT OF THE CASE

Moore has taught humanities at the University of Virginia since 1947 and resides in a racially intergrated

area of Albemarle County. His property shares a common border with a 128-acre parcel on the Rivanna Reservoir known as Evergreen, owned by Fleming and some white business partners. In October 1974 Fleming and his partners filed a special use permit application to build 804 housing units; the land was not zoned for this development, which could not be built as a matter of right (Tr. 307-08, 315, 334).

Moore knew nothing of the Evergreen plan until he was routinely notified by the county as an adjoining landowner of a site plan conference in November 1974. At that meeting, Moore spoke with Fleming about the possibility of purchasing a small fraction of an acre of land where Moore's driveway meets the public road, a subject they had discussed several years earlier (Tr. 65). However, after reviewing plans for this massive development, Moore realized he would be opposed to it. Thinking it would be dishonorable to negotiate privately with Fleming for the property at his driveway while publicly opposing the development, Moore wrote Fleming a short, polite letter to that effect (App. 13).

Moore's public opposition to Evergreen was brief

and insignificant. Fleming distorts and misrepresents the record in an effort to convince this Court that Moore was a leader of opposition forces in the Evergreen matter; nothing could be farther from the truth. Moore did not organize any efforts against Evergreen, he was neither an officer nor a director of any of the numerous citizens organizations that opposed Evergreen and he gave no interviews and made no statements to the press about Evergreen. As Moore put it, "I simply opposed it own my own account" (Tr. 73-74). The first Evergreen plan was proposed in October 1974 and defeated by the Albemarle County Board of Supervisors in January 1975. A second Evergreen plan was filed in November 1975 and Fleming published his libel in January 1976, a few days before the supervisors defeated the second plan. During that entire 16 month period, Moore spoke no more than three times; he never spoke for more than a few minutes and there is a record of what he said on only two of those occassions.

It is important to note that Moore never "took the rostrum" except in response to personal attacks on him by Fleming or Fleming's attorney. Moore only spoke up to set the record straight after being insulted or goaded by Fleming. Fleming now portrays these brief and generally

defensive remarks as being the vanguard of the opposition to Evergreen, an assertion that is as unsupported as it is preposterous.

At the January 1975 meeting of the supervisors on the first Evergreen plan, Moore spoke for a few minutes after being personally attacked by Fleming earlier in the meeting (DX 4 at 504-05). Moore's remarks concerned incompatible land use and the condition of the reservoir, and took less than five minutes to deliver. The verbatim transcript of that meeting is 27 pages long; Moore's comments occupy less than a full page. Moore's comments were overshadowed (indeed dwarfed into insignificance) by the extended and detailed remarks of others who spoke in opposition to Evergreen, including representatives of the Civic League, the Piedmont Environmental Counsel, a member of the state legislature, several university professors, a number of other civic and sportsmens' organizations, the League of Women Voters, the Virginia State Water Control Board and Bureau of Sanitary Engineering and others.

Moore's only other recorded remark at a public hearing occured twelve months later when the Albemarle County Planning Commission considered the second Evergreen

plan. Fleming's attorney questioned where Moore was when another housing development near Evergreen was considered by the Commission, which Moore perceived as a suggestion of hypocrisy on his part (DX 1). Moore's entire comment was that he was present when the other development was considered and he then asked the chairman of the commission if personal attacks were to be allowed at the meeting (DX 1). Moore did not comment on Fleming or Evergreen at that meeting.

Moore did not become identified in the public eye as a leader of the opposition to Evergreen. When questioned by Fleming's counsel at trial on this subject, Moore's attorney during the Evergreen controversy stated:

> I don't think the public knew about it. Perhaps people that attended those meetings might have seen him. But his name in a public sense might have appeared in the newspaper once or twice in three years. (Tr. 289)

Not surprisingly, Fleming never bothers to advise this Court of the enourmous public sentiment against Evergreen and the many individuals and organizations who, unlike Moore, did play significant roles in preventing the rezoning of the Evergreen tract (Tr. 295-98, 300, PX 8, 9, 10, 11, 12, 13, 17, DX 1, 4, 8). Fleming's assertion that "Moore's efforts to obstruct County approval of Fleming's development

were successful" is pathetic. There was no evidence that Moore's brief remarks had anything to do with the supervisors' disapproval of the Evergreen plan. However, Fleming's statement of facts might lead this Court to conclude Moore's opposition was the sole, proximate cause of the defeat of the plans. This assertion is groundless.

Evidence at the second trial of libel suit clearly established that Fleming used race as a weapon to intimidate and harass his opponents, including Moore. He injected it as an issue in the Evergreen development as early as October 1974 and vigorously renewed it at the supervisors' hearings on the first plan (Tr. 176, 182-88, DX 4, PX 9). Fleming sent the supervisors a letter captioned "THE TRUE FACTS" in which he raised racial bias as an issue before the supervisors ever expressed any opinions on his project (DX 4). His comments were so outrageous that the local newspaper published an editorial citing the numerous dangers to the reservoir posed by Evergreen and criticizing what it viewed as an obvious attempt by Fleming and his attorneys to use race as an excuse or weapon to obtain approval for Evergreen since it might not be approved if considered solely on its merits (Tr. 45-47). Fleming's first plan was defeated in January 1975. There was essentially no "Ever-

green controversy" during the period January through November 1975. In the latter month, however, Fleming hastily filed his second Evergreen plan after a group of conservation-minded supervisors were elected to take office in January 1976; protection of the reservior had been a central issue in that campaign (Tr. 434). Environmental concerns were again raised, this time bolstered by the fact that in the summer of 1975 the county and other local governments commissioned an exhaustive study of pollution of the reservior (Tr. 301-02, 321-22) and amended the local soil erosion ordinance to preserve the reservoir (Tr. 343-44). Fleming's second Evergreen plan, like the first, failed to address the county's water pollution concerns (Tr. 198-99, 295-305, 342-43, 345-46, PX 9, DX 1) and was defeated.

Fleming published his libelous attack on Moore just prior to the supervisors' consideration of his second plan. He chose to publish it in the student newspaper of the University of Virginia where he knew Moore made his livelihood (Tr. 224-28). Fleming acknowledged he believed university students would respond to a racially-motivated appeal since "Whenever you talk of racism they show a certain amount of interest, the better type of students show a certain amount of interest" (Tr. 229).

Fleming's accusations of racist belief and racist activity on the part of Moore were utterly false. Moore and several witnesses proved he was not a racist, had been raised to abhor racism and had never said or done anything which could be construed as racist. Fleming produced no evidence at trial tending to suggest there was any truth to his defamatory charges, and he has conceded in the libel appeal now pending in the Supreme Court of Virginia that "...Mr. Fleming never attempted to prove the truth of the statements in the advertisement as a defense to Mr. Moore's claims." (Appellant's Reply Brief at 3, Sup.Ct.Va., Record No. 831446).

Despite the falsity of his charges of racism, Fleming characterizes his charges as mere opinion and suggests that he "candidly" stated that he sincerely "believed" Moore was a racist. Fleming's testimony in this regard, as in most respects at the second libel trial, was inherently incredible. He was impeached on the stand with his own prior sworn testimony twenty-five times (Tr. 177-78, 180-81, 191-92, 193, 202-03, 203-04, 208-09, 219, 225, 225-26, 227-28, 228-29, 230-31, 232-33, 233-34, 238, 395, 398-401, 401, 401, 401-02, 402, 401-04, 404, 418, PX 14 and PX 15).

At trial Fleming attempted to prove his factual allega-

tions of racism against Moore but failed. He attempted to prove Moore's racism by alluding to certain negotiations between himself and Moore which occured fully four months after he published his libel, which of course had no bearing whatever on his publication of the libel (Tr. 179-181, 209-10). He attempted to establish Moore was a racist by asserting Moore had used a racial covenant in a 1935 deed against him (Tr. 208). The speciousness of this contention was laid bare when Fleming conceded that he knew racial covenants in deeds were unenforceable, that both Moore's alleged "use" of the racial covenant and Fleming's awareness of its existence occured after the libel was published, and, ironically, that the only person in the chain of title who ever made a deed to the Evergreen property which reimposed the 1935 racial covenant was Fleming himself when he conveyed his property to the Nature Conservancy (Tr. 210-14, PX 6, PX 7).

ARGUMENT

I. MOORE WAS A PRIVATE INDIVIDUAL THROUGHOUT THE EVERGREEN CONTROVERSY AND DID NOT LOSE THE FIRST AMENDMENT PROTECTIONS ACCORDED PERSONS IN THAT STATUS

Fleming carries the "public figure-private individual" inquiry past any logical extreme. In essence, his position is that any person who speaks out on any matter of public

concern becomes a public figure. Fleming knows only too well that Moore was not a leader of the opposition to Evergreen and Moore's opposition arose largely from his concern for his own private residence. Indeed, Fleming testified that the chief reason he libeled Moore was because the Albemarle County Planning Commission staff insisted that Fleming leave a buffer of existing trees between Evergreen and Moore's residence, a condition that would only benefit Moore personally and was not a matter of public concern (Tr. 82). Further, not only was this buffer a major motivating factor in the defamation, the evidence established beyond any doubt that Moore did not suggest, design, or advocate the buffer (Tr. 61). Thus, the so-called "public controversy" related chiefly to a matter that was of little or no concern to anyone other than the two parties to this action. It was, at most, an adjunct to a larger public controversy.

It is also important to note that Moore never thrust himself to the forefront of the Evergreen controversy. He was dragged into it quite unwillingly by Fleming as a result of Fleming's proposed plans and personal attacks by Fleming and his attorney. Moore was simply a private homeowner whose personal residence happened to adjoin an enormous

housing project planned by a group of local developers, black and white. As such, his attendance at public meetings, pursuant official notification to him by the county, was not unlike the resort to the processes of the courts by Mrs. Firestone in Time, Inc. v. Firestone, 424 U.S. 448 (1976). The majority in that case noted there is a certain amount of unavoidable public exposure involved when one resorts to the judicial process to exercise legal rights. 424 U.S. at 454. Moore had a legitimate interest in the Evergreen matter and had no choice but to attend administrative meetings in order to protect his limited private interest.

The specious and preposterous nature of Fleming's public figure argument is accentuated by his repeated and unwarranted resort to ad hominem attacks upon Moore. For example, he describes Moore's position as "a vigorously antagonistic stance" regarding Evergreen (petition for certiorari at 8) and argues Moore gave "strident voice to his opposition to the Evergreen development" (petition for certiorari at 17). There is absolutely nothing in the record to support these characterizations of Moore; indeed, Moore is a very private academician whose comments at trial and during the Evergreen matter were self-effacing and understated. No better proof of his low-key approach to

the whole matter exists than his brief, polite letter to Fleming declining to negotiate with him privately regarding land at his driveway (App. B). Perhaps Fleming feels he must "gild the lilly" to make Moore look like a public figure as defined in Harris v. Tomczak, 94 F.R.D. 687, 704 (E.D. Cal. 1983). Moore is not such a public figure, nor was the famous and very public Dr. Harris in that case.

Moore's participation in the Evergreen matter is not unlike that of the plaintiff in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In concluding it was plain that Gertz was not a public figure, this Court noted:

> He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue nor did he engage the public attention in an attempt to influence its outcome. 418 U.S. at 352.

There is no evidence that Moore ever became the object of any discernable degree of public attention or comment. See Hutchinson v. Proxmire, 434 U.S. 111, 135 (1979).

Similarly, in Wolston v. Reader's Digest Association, Inc., 413 U.S. 157, 167-168 (1971) this Court held "a private individual is not automatically transformed into a public

figure just by becoming involved in or associated with a matter that attracts public attention," emphasizing the importance of focusing on the "nature and effect of an individual's participation in the particular controversy giving rise to the defamation." It is inconceivable that a private individual who speaks out for a few minutes on two or three occasions over a 16-month period to protect his private interests would become a public figure, especially when his voice was perhaps the least among scores of voices raised in opposition to Evergreen. Indeed, the gravamen of Fleming's argument is not only that any person who speaks out on any subject related to a public controversy is a public figure, but that any libel defendant who singles out a private individual as the target of his libel during a public controversy also becomes a public figure, however involuntarily and unwillingly. This theory was specifically rejected by this Court in Hutchinson, supra, at 135.

II. FLEMING'S FACTUAL ASSERTION THAT MOORE HELD RACIST BELIEFS AND ENGAGED IN RACIALLY-DISCRIMINATORY BEHAVIOR IS NOT ENTITLED TO CONSTITUTIONAL PROTECTION

Fleming relies heavily on this Court's language in Gertz that there is no such thing as a false idea, 418 U.S. at 339-40, to suggest that if any idea enters one's head, however

far-fetched or fanciful, it is somehow entitled to constitutional protection. The extreme application of this curious theory is found in Fleming's assertion at page 22 that since he subjectively concluded he was the victim of racism by Moore, having no facts to support that conclusion, his factual assertion of racist belief and conduct against Moore was an "idea" or "opinion" entitled to constitutional protection. It is no suprise he has no case law to support this theory.

Remarkably, Fleming has the audacity to argue here that he lacked the "high degree of subjective awareness of the probable falsity of his opinion," relying on New York Times v. Sullivan, 376 U.S. 254 (1964) (petition for certiorari at 21-23). One wonders how he can make this statement and yet, as noted before, represent to the Supreme Court of Virginia that he "... never attempted to prove the truth of the statements in the advertisement as a defense to Mr. Moore's claims" and failed to prove he had any basis for his charges against Moore. The answer was evident to the jury and should be evident here. Fleming made up grounds for his attacks on the witness stand and he now misrepresents his "state of mind" in his petition. As noted before, Fleming was impeached with his own prior sworn testimony twenty-five

times during the second trial of this case. Many of these impeachments related to his transparantly false protestations of a sincere belief that Moore was a racist and discriminated against him on the basis of race.

III. FLEMING'S ATTACKS WERE FALSE STATEMENTS OF FACT, NOT OPINIONS

Fleming misses the point entirely by arguing that he reached a conclusion regarding the motivation of his opponents and simply had no "serious doubts whatsoever" that this "opinion" might be factually incorrect. Fleming is deliberately blurring the line between fact and opinion to create a false impression of what he thought and intended. At trial, and later in his pending appeal in the Supreme Court of Virginia, Fleming attempted to show that Moore conducted himself in a specific fashion that indicated to Fleming he was opposed to Evergreen because of Fleming's race and/or the race of those persons who might live at Evergreen. He did not state any of these facts in his libelous advertisement, but clearly implied his accusations were based on certain undisclosed facts known to him.

Fleming captioned his libelous advertisement "RACISM" and Moore is the only living person named in the body of

the advertisement. Among other things he charged:

> ...We have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of Little Monticello does not want any black people within his sight.

This false and defamatory attack on Moore is part of a lengthy diatribe in which Fleming endeavors to create the impression that he is privy to specific facts arising out of the Evergreen controversy that support his accusations of racist belief and conduct on the part of Moore. Not only are the facts alleged about Moore untrue, there are simply no facts at all which support Fleming's conclusion that Moore was guilty of racially-motivated conduct. Under any standard enunciated since Gertz for delineating constitutionally-protected opinion, this diatribe is not protected "opinion" under the First Amendment.

It is surprising Fleming argues in his petition that his advertisement does not suggest to his readers that he is privy to certain undisclosed facts. Indeed, he leaves out most of the facts pertinent to the Evergreen controvery and simply states factual conclusions regarding the alleged racist beliefs and racist acts of Moore. Fleming's reliance

upon Ollman v. Evans, 713 F.2d 838 (D.C. Cir. 1983) is misplaced. Judge Robinson's decisional framework strongly favors Moore's position. For example, he cites certain statements as "pure opinion" of which one is the "loosely defineable, variously interpretable" derogatory remark that forms a basis for Fleming's opinion argument. Id. at 845. However, the court notes such opinion would be recognized by listeners as not "imputing any specific wrongdoing," which stands in sharp contrast to what Fleming said about Moore. Id. at 846. The judge noted that the more difficult cases are those where the author's deductions or evaluations are stated but that also have some factual content, which he calls "hybrid" statements. Id. He concludes that in determining whether a hybrid statement is or is not privileged opinion one must first consider whether the author discloses to the reader "all pertinent background facts completely and accurately" since "the background facts transform the hybrid in the eyes of the reader from a judgmental conclusion suffused with unspecified, assumed assertions of fact into a simple statement of opinion drawn from enumerated grounds." Id. at 847. When facts are stated either erroneously or incompletely "the reader is unable to place the author's judgment in perspective" and a reader given incomplete

or incorrect facts "mistakenly supposing that all pertinent data are accurately assembled before him, might give even more credence to the author's conclusion." Id. at 848. To be sure, there is no "full and accurate narration of material background facts" in Fleming's advertisments, Id., and it is not entitled to constitutional protection. To like effect is the opinion in Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977) where the court concluded that the author of defamatory remarks who gives the impression of being knowledgeable about the subject matter but who does not disclose the factual basis for his conclusions, has no First Amendment protection for his defamation.

The opinion privilege, narrow as it is, does not encompass Fleming's defamation. Fleming seeks to have it both ways. At trial and in the Supreme Court of Virginia he has attempted to show Moore was a racist and that there were facts specifically establishing Moore's racism. He went so far as to regale the jury with testimony regarding his careful study of Webster's Third International Dictionary to obtain the definition of "racism" before he inserted it in his advertisement (Tr. 236-37). After this detailed definition was read into the record, Fleming could not cite facts regarding Moore's beliefs or actions which met the definitional

standards of the dictionary. Failing thusly, he expects this Court to simply dismiss Moore's action for defamation because Moore's racism is "an idea" which Fleming "held firmly."

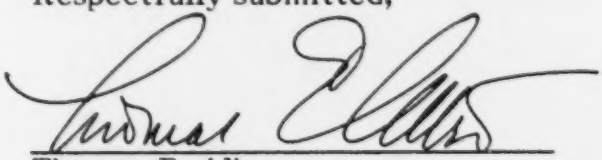
Even if Fleming's attacks could be characterized as "opinions," they were based on false facts that were plainly proved false at trial. As noted in Hotchner, supra, opinions based on false facts are actionable if the defendant"...had knowledge of the falsity or probable falsity of the underlying facts." 551 F.2d at 913. At trial Fleming claims his "opinions" of Moore were based on facts, but time and again these "facts" were shown to be fabrications. As noted above, Fleming cited as an underlying fact Moore's use of a racial covenant in a deed to thwart Evergreen, but he later conceded the "use" of the covenant and his own awareness of it arose four months after the libel was published (Tr. 179-81, 209-10). Fleming also cited as an underlying fact Moore's failure to oppose white developers in the vicinity of Evergreen and asserted that two white developers told him this; however, on cross-examination he conceded he had not discussed this subject with the two developers before libeling Moore (Tr. 201-04). In his appeal to the Supreme Court of Virginia Fleming had the temerity to cite Moore's interest in buying land near his driveway as a fact which led him to call Moore

a racist when at trial he never once testified about Moore's inquiries nor did he ever testify that Moore's inquiries had any bearing on his publication of the libel. (Appellant's Brief at 8, Sup.Ct.Va. Record No. 831446).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied. Respondent respectfully requests an award of his attorney's fees and costs expended herein under the provisions of Rule 49.2 on the ground that the petition for certiorari is frivilous. Respondent will submit a statement of fees and costs after this brief is filed.

Respectfully submitted,



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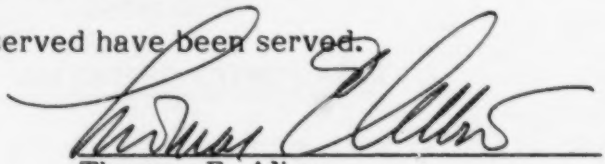
CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 1984 I served counsel for petitioner with three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari by mailing the same, first class postage prepaid to counsel for Respondent at the following address:

D. Alan Rudlin
W. Jeffrey Edwards
HUNTON & WILLIAMS
P.O. Box 1535
Richmond, Virginia 23212

All parties to be served have been served.



Thomas E. Albro

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Charlottesville Division

JAMES N. FLEMING, 304-A Ridge Street Charlottesville, VA 22901 Plaintiff,	:	
v.	:	CIVIL ACTION No. 84-004-C
W. BEDFORD MOORE, III, Shack Mountain Route 5, Lambs Road, State Route 657 Charlottesville, VA 22901, Defendant.	:	

AMENDED COMPLAINT

1. This is an action for injunctive relief to protect rights, privileges and immunitites of the plaintiff guaranteed by the Constitution and laws of the United States. Further, the plaintiff seeks damages, attorneys fees and other relief in vindication of his right, protected by the First Amendment to the Constitution of the United States, to express and publish opinions and ideas for the bringing about of political and social change or for other lawful purposes.

2. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331 and 1343(3). This action arises under the First Amendment and under the

Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States and under Title 42, United States Code, Section 1981 and 1983.

3. The plaintiff, Fleming, was born in Albemarle County, Virginia, on January 27, 1929 and thereafter, except for four years in military service and six years in college and post graduate study, he has lived in Albemarle County or in the adjacent City of Charlottesville. The plaintiff is a black person. All other persons hereinafter mentioned or referred to are white persons, unless otherwise indicated.

4. The defendant, W. Bedford Moore, III, is a tenured professor in the Humanities Division at the School of Engineering and Applied Sciences of the University of Virginia where for over twenty years he has taught. In the 1975-76 academic year he was an associate professor.

5. At all times material, Fleming believed that, with several exceptions, white citizens of Albemarle County and its environs asperse, debase, degrade, discredit, disparage, and reproach black people. The reasonableness of that belief was demonstrated in the second trial of the litigation hereinafter mentioned when Bernard Chamberlain, Esquire, a life long resident of Albemarle County and a practicing attorney since 1922, upon being asked on direct

examination by Moore's counsel if in their twenty-five years of intimate acquaintance he had heard Professor Moore say anything degrading about black people, answered in these words: "I never have, strange thing, I never have".

6. The defendant Moore and his wife own and reside on a 100 acre tract in Albemarle County known as Shack Mountain. Their dwelling house, sited on a ridge, is described in the testimony of an emeritus teacher of architecture at the University of Virginia as a twentieth century version of Thomas Jefferson's Monticello.

7. Prior to 1974 the plaintiff, Fleming, had acquired title to 81.5 acres adjoining which were 32+ acres belonging to Flamenco, a corporation the stock of which was owned equally by Fleming and B.B. Woodson. These two parcels, for more than 3,000 feet, adjoin the defendant's Shack Mountain. Another tract, adjacent to the 81.5 acres and to the 32+ acres and containing 14+ acres, was owned by Dailey Craig. The owners of these 128 acres, more or less, had agreed to develop thereon a residential subdivision to be known as Evergreen.

8. On or about _____ November 1974, the plaintiff, Fleming, and his associates submitted to the Planning Commission for Albemarle County a plan for the development

of Evergreen as a planned unit development of six dwellings per acre, with an average price of $35,000 (Evergreen I). The intent of the developers, and particularly of Fleming, to sell homes to persons of either race was prominent.

9. Out of ostensible concern for the proposed influx of 2,400 people viewed by them as an invasion of the peace and harmony on Shack Mountain and, further, out of professed concern for increased pollution of the reservoir as in their perception the Evergreen plan forebode, Professor and Mrs. Moore attended the site plan meeting on the Evergreen project in November 1974. On that occasion Moore expressed to Fleming an interest in acquiring a fraction of an acre of Fleming's land and was given a copy of the subdivision plat. The two men exchanged promises that Moore and the proponents of Evergreen would meet within ten days to negotiate.

10. Under date of 27 November 1974, Moore informed Fleming of his decision to abandon the proposed negotiations and to oppose the Evergreen project in the public hearings, explaining his decision in these words: "as I feel I must do for the good of my neighbors and the county as a whole." A copy of the letter is herewith filed as Exhibit "A".

11. At two subsequent meetings of the Planning

Commission held in or about January of 1975 the defendant, Moore, addressed the Commission in opposition to the proposed plan for Evergreen as did many other persons, several of whom were professors at or otherwise identified with the University of Virginia. The only black person who spoke in opposition to Evergreen was then the Mayor of the City of Charlottesville who expressed official concern for the reservoir which supplies drinking water for the inhabitants of the City. Among those who spoke in opposition was the Professor Frederick Nichols, Chairman of Architectural History at the University, who expressed concern for the historical aspect of Shack Mountain. The defendant's speech at the January 22, 1975 meeting of the Board of Supervisors, in opposition to Evergreen I, is herewith filed as Exhibit "B". At a subsequent meeting of the Board of Supervisors, Evergreen I was defeated.

12. In or about September of 1975 and at the instance of Professor Frederick Nichols, a social and professional colleague of Professor Moore for about thirty years and a member of the Virginia Historic Landmark's Commission from its beginning, Shack Mountain was designated by that Commission as one of the most important buildings in the cultural history of the state. In support of this proposed

designation, the Dean of the School of Architecture of the University of Virginia had explained that the siting of the place on the ridge with the view enhanced by cut out windows in the trees is a part of the architectural conception which makes the building so important. A housing development visible from the back porch of the Shack Mountain dwelling house or from the flower garden would spoil this architectural conception.

13. Sometime before a second plan for the development of Evergreen had been submitted, the defendant, Moore, discussed the historic character of Shack Mountain with his representative on the Board of Supervisors.

14. In or about November of 1975, the plaintiff, Fleming, and his associates submitted to the Planning Commission a second plan for the development of Evergreen (Evergreen II) which proposed the erection of two and one-half dwelling units per acre rather than the six units proposed in the first plan.

15. The defendant, Moore, continued to oppose the development of Evergreen.

16. The Planning Office provisionally approved this second plan for the developing of Evergreen; one of the conditions for approval being the reservation of an eight

acre tree buffer, a strip 100 feet wide along the border with Shack Mountain, to mask the Evergreen development from the view from Shack Mountain.

17. Before these conditions had been communicated to the plaintiff or his associates, the defendant, Moore, obtained a mimeographed copy of the conditions on the same night they were determined by the Planning Commission.

18. At two public meetings of the Planning Commission and at two public meetings of the Board of Supervisors, the defendant, Moore, was in attendance in opposition to Evergreen II and at one or more of such meetings he was represented by James B. Murray, Jr., Esquire, who, asserting his role as attorney for W. Bedford Moore, III, spoke in opposition to Evergreen II.

19. By letter of 11 December 1975, on behalf of Mr. and Mrs. Bedford Moore, James B. Murray, Esquire, suggested that he meet with Fleming and his associates and his attorney Edgar F. Puryear, Esquire, to whom the letter was addressed, to discuss changes in Evergreen II which the Planning Commission had required; the buffer strip being the only change specifically mentioned in the letter. A copy of this letter is herewith filed marked Exhibit

"C".

20. By this manifestation of Moore's interest in the proposed 100 foot buffer strip on Fleming's property for the entire length of their common boundary, together with the rather obvious fact the Fleming's loss of the use of eight acres of his land would benefit no one but Moore, the plaintiff was led to believe that Moore had instigated the idea of the tree buffer for one or both of two purposes: (1) to further reduce the population density of Evergreen by some twenty dwelling units "for the good of [his] neighbors and the county as a whole"; and (2) to screen the low cost housing development from the view of Shack Mountain, for the good of the owners of Shack Mountain and their successors in title.

21. In each of the plans for the development of Evergreen, the plaintiff and his associates had shown that the several dwelling units would be connected to the municipal water mains and that sewage from the Evergreen development would be pumped into the minicipal sewer lines.

22. The plaintiff was aware that lands owned by other persons in the immediate vicinity of the proposed Evergreen development were zoned to permit residential developments of higher density than that proposed for

Evergreen and, further, that such development of those lands was not conditioned upon the pumping of sewage into the municipal sewer lines. Immediately across State Highway 743 from Evergreen and between Evergreen and the reservior were three tracts, aggregating approximately 100 acres, zoned to permit six dwelling units per acre. Adjacent to and east of Evergreen there were approximately 45 acres zoned to permit twenty dwelling units per acre. Adjacent to and south of Evergreen was a duplex development, with a population density of six units per acre, all of the occupants of which are white. The natural drainage of all of these lands is into the reservior.

23. Plaintiff, Fleming caused to be published in the January 16, 1976 edition of the Cavalier Daily (a newspaper published at the University of Virginia) and, also, in the Charlottesville-Albemarle Tribune (a newspaper published in the City of Charlottesville) an article captioned "RACISM" the full text of which is filed as Exhibit "D" hereof. Of and concerning the defendant Moore the articles says:

> "There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monticello upon the hilltop overlooking the development community we have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive

> working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little Monticello does not want any black people within his sight."

24. On or about May 20, 1976, the defendant, Moore, through his attorney, offered to pay the plaintiff, Fleming, $25,000 for a one hundred feet strip adjoining Shack Mountain. On another occasion, a meeting of the Board of Supervisors, Moore inquired and ascertained from the curator of Monticello that Thomas Jefferson had, indeed, located his slaves' quarters down hill from and in sight of his mansion house.

25. On 3 January 1977 the instant defendant, Moore, filed in the Circuit Court of Albemarle County an action for damages against the instant plaintiff, Fleming, demanding $500,000 in actual damages and $500,000 in punitive damages, predicated on a charge that the 16 Janaury 1976 publication was a false, scandalous, malicious, insulting and defamatory libel of and concerning him (Moore) and that same had been wrongfully, willfully, maliciously and injuriously published by Fleming. At or about the same time, the instant defendant, Moore, filed a similar action in the Circuit Court of the City of Charlottesville which

has not been called for trial.

26. The first trial of the libel action ended on December 6, 1977 with a jury verdict awarding Mocre $10,000 in compensatory damages and $100,000 in punitive damages, on which the trial court entered judgment on April 28, 1978. Over the dissent of Justice Harrison who would have reversed and entered final judgment for the defendant (Fleming), the Supreme Court of Virginia reversed the judgment of the trial court and remanded the case for a new trial. (Fleming v. Moore [March 6, 1981], 221 Va. 884, 275 S.E. 2d 632).

27. The Supreme Court of Virginia read the record as showing that Moore merely resorted to an administrative body in order to protect the value of his own residence and, hence, held that Mocre's role in the public hearings concerning "Evergreen" do not merit his classification as a public figure with the burden of showing, as a prerequisite to recovery of compensatory damges, that Fleming acted with malice. However, the record then before the Supreme Court did not contain the text of Mocre's 27 November 1974 letter to Fleming (Exhibit "A") wherein Moore classified his intended opposition to Evergreen as "[something] I feel I must do for the good of my neighbors

and the county as a whole."

28. The second trial of the libel action ended on October 22, 1982 with a jury verdict awarding Moore $100,000 in compensatory damages and $250,000 in punitive damages, together with interest on the $250,000 award at the rate of 12% per year from January 16, 1976. Moore's counsel had peremptorily struck every black citizen from the venire and thus caused the jury to be entirely composed of white citizens. Judgment on this verdict was entered on June 3, 1983.

29. The 27 November 1974 letter from Moore to Fleming (Exhibit "A" herein) was received as evidence in the second trial of the libel action. No pecuniary or other loss was shown. Neither was there evidence of actual malice. There was a complete absence of evidence that Fleming had any question, much less serious doubts, as to the truth of his opinion of Moore's motivations. Nevertheless, on proof limited to Moore's claim that on occcasions he was upset and embarrassed, the all white jury levied against Fleming the largest libel verdict ever upheld by a trial court in the Commonwealth.

30. By order entered on 7 June 1984 the Supreme Court of Virginia awarded James N. Fleming an appeal

from the judgment of the Circuit Court of Albemarle County, limited to four assignments of error, viz:

D. The jury's award is so excessive that it indicates the jury was influenced by passion, prejudice or corruption, or misconceived or misconstrued the law or facts.

E. The jury's award of prejudgment interest at the rate of 12% per annum is contrary to law because prejudgment interest is not allowable on punitive damages and, further, because 12% exceeds the maximum allowable rate of prejudgment interest.

G. The trial court erred in refusing to instruct the jury that, in order to find Fleming liable for compensatory damages, it must find that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

H. The trial court erred in refusing to strike plaintiff's evidence on punitive damages because there was insufficient evidence on which the jury could conclude that Fleming knew what he was publishing was

false or had reckless disregard for whether or not it was true.

31. In so doing, the Supreme Court of Virginia rejected other assignments of error, viz:

A. The trial court erred in failing either to grant Fleming's Motion to Dismiss or strike plaintiff's evidence because the alleged libel was an absolutely privileged expression of opinion under the First Amendment.

B. The trial court erred in failing to strike plaintiff's evidence because the alleged libel was not defamatory as a matter of law.

C. The trial court erred in failing either to grant Fleming's Motion for Summary Judgment or his motion to strike plaintiff's evidence because plaintiff failed to prove special damages, which must include but are not limited to monetary loss.

F. The trial court erred in concluding that Moore was not a public figure.

I. In the specific circumstances and context of this case, the plaintiff's striking every

black juror to create a jury without blacks deprived Fleming of his right to due process under the Fifth and Fourteenth Amendments and to a jury trial under the Seventh Amendment.

32. By reason of the two verdicts in the libel action, found by all-white juries, by each of which the instant plaintiff was cost solely because of his race and on each of which the trial court entered judgment, and by reason of the summary affirmance of the rulings of the trial court to which assignments of error "A", "B", "C", "F", and "I" were asserted in the Supreme Court of Virginia, the plaintiff, Fleming, is persuaded that, unless this court will intervene, the First Amendment does not protect his freedom in or near Albemarle County to speak or to publish his opinions on matters of public concern, particularly or racial issues, if the object of his intended criticism is a white person. The chilling effect of the pending libel actions impels the plaintiff to forego such participation in the public exchange of ideas.

33. The plaintiff is a realtor and a considerable part of his income has come from his buying and selling real estate. On or about 6 June 1983 the defendant, Moore,

caused said 3 June 1983 judgment to be docketed in the Clerk's Office of the Circuit Court of Albemarle, in the Clerk's Office of the Circuit Court of the City of Charlottesville, and in the Clerk's Office of the Circuit Court of the City of Waynesboro, in which political subdivisions the plaintiff, Fleming, owns real properties which constitute the bulk of his estate. The plaintiff's conduct of his business and his earning a livelihood is and will continue to be hampered by the fact that the judgment in the libel action has been docketed in the several Clerk's Offices and appears to be a lien upon the plaintiff's real estate. An irrevocable letter of credit was obtained and accepted by the trial judge in lieu of surety for the initial appeal bond in penalty of $250,000. Subsequently, on motion of Moore's counsel, the Supreme Court of Virginia required additional bond with approved surety in penalty of $480,000. The plaintiff's access to working capital has been egregiously curtailed as a result of the requirements of appeal bond in penalty of $710,000.

34. Plaintiff, Fleming, has paid or obligated himself to pay enormous sums of money in the defense of the libel action and in prosecuting appeals from judgments therein. Unless relief as herein prayed will be granted, the plaintiff's

prospects for relief are and will be limited to the unlikely possibility that the Supreme Court of the United States will grant certiorari to review the 7 June 1984 rejection, by the Supreme Court of Virginia, of his claim of privilege under the First Amendment to the Constitution or the probability that, at best, the Supreme Court of Virginia will again remand the libel action for a third trial. Meanwhile, the plaintiff is and will continue to be deprived of the day to day protection of the First Amendment, will continue to suffer diminution, if not a deprivation, of his ability to carry on his business and to earn a livelihood.

35. Moreover, the continued prosecution of the libel actions and the appearance of liens encumbering plaintiff's properties and the inordinate requirements of bond of such magnitude as to disestablish the plaintiff's credit combine to effect a deprivation of plaintiff's property without due process of law in violation of the Fourteenth Amendment to the Constitution.

WHEREFORE, the plaintiff prays:

a. That the court will set this matter for an early hearing on the merits and thereupon adjudge and decree that the publication, which is the basis for the judgment of the Circuit Court of the County of Albemarle entered

on June 3, 1983 in favor of W. Bedford Moore, III and against James N. Fleming, is indeed within the protection of the First Amendment and that the said judgment is null and void and of no effect in law.

b. That the defendant, W. Bedford Moore, III will be permanently enjoined and restrained from causing execution to be issued upon, or otherwise taking any steps to enforce payment of, the judgment of the Circuit Court of the County of Albemarle entered on June 3, 1983 in favor of W. Bedford Moore, III and against James N. Fleming.

c. That the defendant, W. Bedford Moore, III, will be permanently enjoined and restrained from further prosecuting any action for libel against the plaintiff, James N. Fleming, which may be predicated upon the enouncement the full text of which is reproduced as Exhibit "D" hereof.

d. That the plaintiff will recover of the defendant damages in compensation for his costs, expenses, counsel fees, harrassment, and loss of time in defending the action for libel, and his costs and reasonable counsel fees incident to this action, and such other and further relief as is just.

/s/ James N. Fleming
James N. Fleming

GERALD G. POINDEXTER
P.O. Box 766
Surry, VA 23883

/s/ S.W. Tucker
S.W. TUCKER
HILL, TUCKER & MARSH
509 North Third Street
P.O. Box 27363
Richmond, VA 23261-7363

Counsel for Plaintiff

VERIFICATION

STATE OF VIRGINIA

CITY OF CHARLOTTESVILLE, to-wit:

Before me, the undersigned Notary Public for the State of Virginia at Large, personally appeared JAMES N. FLEMING in the City aforesaid and made oath that the matters and things stated in the foregoing complaint by him subscribed are true to the best of his knowledge, information and belief.

Given under my hand and Notarial Seal this 2nd day of August, 1984.

My commission expires: May 24, 1986

/s/ Nathaniel W. Smith
Notary Public

CERTIFICATE

I certify that on the 6th day of August, 1984, a copy of the foregoing Amended Complaint with Exhibits A, B, C, and D was mailed by Certified Mail #570767 to W. Bedford Moore, III, Shack Mountain, Route 5, Lambs Road, State Route 657, Charlottesville, VA 22901.

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27 November 1974

Mr. James N. Fleming
Ideal Realty Company
304-A Ridge Street
Charlottesville, Virginia 22901

Dear Mr. Fleming:

I write to you as a courtesy to say that I have not followed up that proposed meeting with you and your partners because I have realized upon looking further into the matter, that I could not negotiate with you gentlemen in good faith and then turn around and oppose your project in the public hearings—as I feel I must do for the good of my neighbors and the county as a whole.

Let me assure you that there is absolutely nothing personal in my opposing you on this matter.

Sincerely yours,

Bedford Moore

BM:pa